Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1943

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Plaintiffs-Appellants,

vs.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Defendants-Appellees.

On Appeal from the Final Order of the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

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In The

Supreme Court of the United States

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No.

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Plaintiffs-Appellants,

vs.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Defendants-Appellees.

On Appeal from the Final Order of the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

STATEMENT AS TO JURISDICTION

The appellants, pursuant to the United States Supreme Court Rules 13(2) and 15, file this statement of the basis upon which they have contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise such jurisdiction in this case.

OPINION BELOW

The United States Court of Appeals for the Third Circuit on February 15, 1980, decided and filed its written opinion, which is not yet reported. A copy of the opinion is attached to this jurisdictional statement as Appendix B. A petition for rehearing in banc was denied by the court on March 19, 1980.

JURISDICTION

The appeal herein is from a final judgment decided and filed by the United States Court of Appeals for the Third Circuit on February 15, 1980, which held that ". . . the provision of the pension plan(s) of defendant(s) . . . Raybestos Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute . . . are not unlawful under ERISA and that the New Jersey statute prohibiting them is pre-empted by ERISA."

Plaintiffs' petition for rehearing in banc was denied on March 19, 1980 and notice of appeal was filed on April 25, 1980 with the Clerk of the United States Court of Appeals for the Third Circuit.

The Supreme Court of the United States has jurisdiction to review, by direct appeal, the opinion complained of by the provisions of 28 U.S.C. §1254(2).

The following decision sustained the jurisdiction of the Supreme Court to review the opinion on direct appeal in this case: *The United States Gas Pipeline Company v. Ideal Cement Company,* 369 U.S. 134 (1961); *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954), *rehearing denied,* 348 U.S. 921 (1954).

The statute of the State of New Jersey declared preempted by ERISA, by the Circuit Court of Appeals, is

"34:15-29. Compensation preferential lien; claim not assignable; *setoffs*

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter may be allowed by law for a claim for unpaid wages for labor. Claims are payments due under this chapter shall not be assignable and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees retirement pension benefits or payments. Amended by L. 1977, c. 156 Section 1, effective July 14, 1977."

The United States Court of Appeals for the Third Circuit held that the statutory scheme presented by this statute for the preservation of benefits to those injured in industrial accidents is unconstitutional because it is preempted by ERISA, 29 U.S.C. §1144(a). The court further declared that the subject offsets were not impermissible forfeitures under ERISA itself, 29 U.S.C. §1053(a). The decision effects an invasion into the established police power possessed by a state to protect workers within the state and misapprehends the true character of workers' compensation benefits.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are: New Jersey Statutes Annotated, 34:15-29 (Supp. 1979) and the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§1001, *et seq.;* 1053(a); 1144; 1002(19); 1021(e). The constitutional provision involved is the United States Constitution, Article VI, Section 2.

QUESTIONS PRESENTED

The Court of Appeals for the Third Circuit erred:

I. In holding and concluding that N.J.S.A. 34:15-29 is unconstitutional because it is preempted by ERISA, 29 U.S.C. §1144(a) and therefore violative of the Supremacy Clause of the United States Constitution, Article VI, Section 2.

II. In holding and concluding that the offset provision in question is not unlawful under ERISA, 29 U.S. §1053(a).

STATEMENT OF THE CASE

On February 1, 1978, plaintiffs filed a class action complaint in the Superior Court of New Jersey, Chancery Division. The gravamen of the complaint was that the defendants, in offsetting plaintiffs' retirement pension benefits by like amounts due to plaintiffs by a virtue of New Jersey Workers' Compensation judgments violated N.J.S.A. 34:15-29 (Supp. 1979). The case was removed to the United States District Court for the District of New Jersey on March 3, 1978. Subsequently, class certification was abandoned.

The following statement of stipulated facts was filed with the court on December 28, 1978:

> "The parties to the above captioned-matter hereby agree to stipulate to the following facts for the purposes of this litigation only:
>
> (1) The plaintiffs in this action are all former employees of defendant, Raybestos-Manhattan, Inc. (Raybestos).
>
> (2) The plaintiffs' dates of service are: (a) Joseph Alessi, September 14, 1939 to March 1, 1972; (b) Raymond Buisson, November 10, 1941

to January 1, 1973; (c) Stephen Michalski, June 30, 1942 to February 28, 1973; (d) Charles Repka, June 22, 1934 to June 13, 1973; (e) Helen Vogt, August 17, 1944 to September 28, 1973; (f) T. Edward White, July 8, 1941 to June 8, 1973.

(3) With the exception of Helen Vogt, the plaintiffs are all entitled to retirement income payments from Raybestos under the terms of the Raybestos-Manhattan Inc. Employee Retirement Plan (Pension Plan).

(4) Although Helen Vogt did not qualify for retirement under the terms of the Pension Plan, she is eligible to receive Deferred Termination Benefits commencing February 1, 1979.

(5) Many more former employees of Raybestos are receiving or are entitled to receive pension or deferred compensation benefits.

(6) Article VI, Section (4)(b) of the Pension Plan and the Deferred Termination Benefits agreement provide in relevant part that workmen's compensation benefits are deductible from pension benefits.

(7) Under the terms of the Pension Plans a person is paid a lump sum amount at the time the workmen's compensation judgment is awarded. Thereafter, when he commences receiving pension or deferred compensation payments, a certain amount is deducted each month from these payments until the amount paid in workmen's compensation judgment is fully offset.

(8) The offset provision provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

(9) Effective July 14, 1977, N.J.S.A. 34:15-29 was amended by Chapter 156 of the Laws of 1977 to include a provision that:

> The right of compensation granted by this Chapter may not be set off against employee's retirement pension benefits or payments.

(10) Each of the plaintiffs secured a Judgment against the respondent pursuant to the New Jersey Worker's Compensation Act (N.J.S.A. 34:15-1 *et seq.*).

(11) The date and amount of the award for each respective plaintiff are: (a) Joseph Alessi, November 30, 1977, $6,470.00; (b) Raymond Buisson, October 20, 1977, $6,760.00; (c) Stephen Michalski, November 9, 1977, $4,380.00; (d) Charles Repka, August 8, 1977 $6,200.00; (e) Helen Vogt, November 21, 1977, $880.00; (f) T. Edward White, November 21, 1977, $6,170.00.

(12) Since the date of the respective worker's compensation awards, the following offsets have

been made monthly by defendant: (a) Joseph Alessi ($173); (b) Raymond Buisson ($154); (c) Stephen Michalski ($170); (d) Charles Repka ($173); (e) Helen Vogt (none); (f) T. Edward White ($158).

(13) Plaintiffs made a demand upon defendant after Chapter 156 was enacted to cease offsetting workmen's compensation judgment payments from retirement income payments.

(14) Defendant has refused to comply with the demand for the legal reasons stated in its brief.

(15) The question presented in this case is whether the deductions made subsequent to the date Chapter 156 was amended are lawful."

The court, in an opinion dated February 15, 1979, found for plaintiffs, granting relief in the form of damages and an injunction barring further offsets. In so doing, the court held that N.J.S.A. 34:15-29 was not preempted by ERISA, 29 U.S.C. §1144(a) and that ERISA itself made such offsets impermissible forfeitures, 29 U.S.C. §1053(a). An order in conformity with the court's opinion was entered on March 7, 1979. *See* Appendix A.

Defendants filed a notice of appeal on March 19, 1979. The appeal was docketed in the United States Court of Appeals for the Third Circuit on April 30, 1979. Orders granting stay of payment of damages and approving supersedeas bond and granting stay of injunctive relief pending appeal were entered on March 21, 1979 and May 3, 1979 respectively.

Briefs were submitted to the court by both parties and the Attorney General of the State of New Jersey, who sought and was granted permission to intervene. The case was called for oral argument on January 8, 1980. At the time of the argument, the

case was consolidated with *Buczynski v. General Motors Corp.*, 456 F. Supp. 867 (1978) (notice of appeal filed March 12, 1979, docket no. 79-1668) which involved substantially the same issues.

On February 15, 1980, the court of appeals rendered its opinion, reversing the decision of the United States District Court in its entirety in this case as well as *Buczynski.* The court held that:

> ". . . the provision of the pension plans of defendants General Motors and Raybestos-Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute . . . are not unlawful under ERISA, and that the New Jersey statute prohibiting them is pre-empted by ERISA."

On or about February 27, 1980, plaintiffs filed a petition for rehearing in banc with the clerk of the court of appeals. On March 19, 1980, said petition was denied.

An order in conformity with the opinion of the court of appeals was entered in the United States District Court.

Notice of appeal to the Supreme Court of the United States was filed with the Clerk of the United States Court of Appeals for the Third Circuit on April 25, 1980 along with a request to certify and transmit the entire record to the Supreme Court.

THE FEDERAL QUESTIONS SUBMITTED ARE SUBSTANTIAL

The Third Circuit Court of Appeals has held that the New Jersey statute protecting an injured worker's right to compensatory benefits from invasion by a plan designed to deliver vested retirement income, the nature and extent of which

is based upon employment tenure alone, is preempted by ERISA. In doing so, the court eroded the state's police power in an area which has historically been safeguarded. *DeCanas v. Bica,* 424 U.S. 351 (1976). Moreover, the court failed to apply the tests for preemption which were set forth by the Supreme Court in *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132 (1963) and by the Third Circuit itself in *Rogers v. Larson,* 563 F.2d 617 (3rd Cir. 1977), *cert. denied,* ____ U.S. ____, 58 L. Ed. 2d 95 (1978). There exists a wide divergence of opinion in the federal judiciary concerning whether or not state statutes such as presented here are, in fact, preempted by ERISA. This is evidenced by conflicting decisions within the District of New Jersey itself. *Compare Carpenter Technology Corp. v. Boyton,* Civil No. 78-1415, Filed December 12, 1979 (supplemental opinion filed March 7, 1980). *See* Appendix G.

Notwithstanding the validity of the New Jersey statute, the court of appeals held that the offsets in question did not violate the anti-forfeiture provisions of ERISA. The court founded its reasoning in this regard upon an implicit approval, by Congress, of a scheme of integration of social security and retirement pension benefits. The court equates workers' compensation with social security benefits and concludes that it is implicit also that the former may be integrated. The court's conclusion misapprehends the true character of workers' compensation benefits.

Again, it is readily apparent that judicial opinion is divided concerning the propriety of the offset provision in question. In its own opinion, the court of appeals, in footnote 10, cites six cases where the federal courts have been equally divided as to the solution to the same issue. The Sixth Circuit Court of Appeals has not yet proffered its opinion in *Utility Workers Union v. Consumers Power Co.,* 453 F. Supp. 447 (Eastern Dist. Mich. 1978), *appeal* docketed no. 78-1402 (6th Cir., August 2, 1978).

CONCLUSION

It is submitted that the decision of the Third Circuit holding N.J.S.A. 34:15-29 preempted by ERISA failed to give due regard to Supreme Court doctrines in *Florida Lime and Avocado Growers, supra,* and *DeCanas, supra,* and infringes upon the state's historic police powers. Moreover, the decision results in an integration of benefits scheme which is contrary to the overall intention of Congress in formulating ERISA. The inconsistent decisions of the federal courts among the states bespeaks the national importance of the issues and the need for uniformity. Accordingly, the federal questions presented require the plenary consideration of the United States Supreme Court for resolution.

Respectfully submitted,

s/ Michael S. Scarola
GELMAN & GELMAN
Attorneys for Plaintiffs-Appellants

APPENDIX A — OPINION OF THE HONORABLE LAWRENCE A. WHIPPLE DATED FEBRUARY 15, 1979

UNITED STATES DISTRICT COURT

District of New Jersey
Newark, N.J. 07101

FILED FEB. 15, 1979

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Re: Joseph Alessi et al. v. Raybestos-Manhattan, Inc., et al.
Civil No. 78-0434

Gentlemen:

Counsel in this matter have submitted a comprehensive stipulation of facts and trial briefs and have consented to my deciding the matter on the basis of those submissions. Accordingly, I find for the plaintiffs for the reasons set out herein.

I. Procedural Posture

This action was originally filed in the Chancery Division of the Superior Court of New Jersey on February 1, 1978. Soon thereafter defendants removed the action to this Court pursuant to 28 U.S.C. §1441. Jurisdiction in this Court is based on 28 U.S.C. §1337 and 29 U.S.C. §§1001 et seq., 1132.

II. Facts

The submitted facts as stipulated to by counsel covers all the pertinent data in a manageable format.

Appendix A

(1) The plaintiffs in this action are all former employees of defendant, Raybestos-Manhattan, Inc. (Raybestos).

(2) The plaintiffs' dates of service are: (a) Joseph Alessi, September 14, 1939 to March 1, 1972; (b) Raymond Buisson, November 10, 1941 to January 1, 1973; (c) Stephen Michalski, June 30, 1942 to February 28, 1973; (d) Charles Repka, June 22, 1934 to June 13, 1973; (e) Helen Vogt, August 17, 1944 to September 28, 1973; (f) T. Edward White, July 8, 1941 to June 8, 1973.

(3) With the exception of Helen Vogt, the plaintiffs are all entitled to retirement income payments from Raybestos under the terms of the Raybestos-Manhattan Inc. Employee Retirement Plan (Pension Plan).

(4) Although Helen Vogt did not qualify for retirement under the terms of the Pension Plan, she is eligible to receive Deferred Termination Benefits commencing February 1, 1979.

(5) Many more former employees of Raybestos are receiving or are entitled to receive pension or deferred compensation benefits.

(6) Article VI, Section (4)(b) of the Pension Plan and the Deferred Termination Benefits agreement provide in relevant part that workmen's compensation benefits are deductible from pension benefits.

(7) Under the terms of the Pension Plan a person is paid a lump sum amount at the time the workmen's compensation judgment is awarded. Thereafter, when he commences receiving pension or deferred compensation payments, a certain amount is deducted each month from these payments until the amount paid in workmen's compensation judgment is fully offset.

Appendix A

(8) The offset provision provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

(9) Effective July 14, 1977, N.J.S.A. 34:15-29 was amended by Chapter 156 of the Laws of 1977 to include a provision that:

> The right of compensation granted by this Chapter may not be set off against employee's retirement pension benefits or payments.

(10) Each of the plaintiffs secured a Judgment against the respondent pursuant to the New Jersey Worker's Compensation Act (N.J.S.A. 34:15-1 et seq.).

(11) The date and amount of the award for each respective plaintiff are: (a) Joseph Alessi, November 30, 1977, $6,470.00; (b) Raymond Buisson, October 20, 1977, $6,760.00; (c) Stephen Michaleski, November 9, 1977, $4,380.00; (d) Charles Repka, August 8, 1977, $6,200.00; (e) Helen Vogt, November 21, 1977, $880.00; (f) T. Edward White, November 21, 1977, $6,170.00.

(12) Since the date of the respective worker's compensation awards, the following offsets have been made monthly by defendant: (a) Joseph Alessi ($173); (b) Raymond Buisson ($154); (c) Stephen Michalski ($170); (d) Charles Repka ($173); (e) Helen Vogt (none); (f) T. Edward White ($158).

(13) Plaintiffs' made a demand upon defendant after Chapter 156 was enacted to cease offsetting workmen's compensation judgment payments from retirement income payments.

(14) Defendant has refused to comply with the demand for the legal reasons stated in its brief.

(15) The question presented in this case is whether the deductions made subsequent to the date Chapter 156 was amended are lawful.

III. Discussion

A. Preemption.

Defendant contends that the amended N.J.S.A. §4:15-29 is unconstitutional under the Supremacy Clause of the United States Constitution, in that it is preempted by ERISA, 29 U.S.C. 1001 et seq.

When the laws of a state are challenged as void under the Supremacy Clause no simple formula can capture the complexities of such a determination. *Goldstein v. California,* 412 U.S. 546 (1973); *Rogers v. Larson,* 563 F.2d 617 (3d Cir. 1977), *cert. denied sub nom. Larsen v. Lockhart,* ____ U.S. ____, (October 2, 1978). Despite the problems inherent in determination of conflicts between state and federal laws, the *Rogers* court points out that the Supreme Court has developed three grounds under which a local statute may be deemed preempted by federal law:

> (1) Congress has unmistakenly so ordained; or
> (2) If the nature of the regulated subject matter permits no other conclusion but preemption; or
> (3) If it violates the Supremacy Clause by

> standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

See, Rogers v. Larson, supra, 563 F.2d at 620-621.[1]

It is clear that ERISA governs the establishment, operation and administration of virtually all private pension plans in the United States, *Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978). Defendant argues that by virtue of 29 U.S.C. §1144(a):

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The state statute in question is preempted under the first preemption test, in that Congress unmistakenly intended to preempt the state law.

The defendant cites numerous cases where state laws governing pension plans have been preempted by ERISA. Congress certainly intended to occupy the entire field of pension plan law to the exclusion of all state pension plan regulation. 29 U.S.C. §1144(a). N.J.S.A. 34:15-29 however is concerned with workmen's compensation and only has a collateral effect on pension plans. The state statute provides for workmen's

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1. The test itself is culled from: Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 142 (1963); DeCanas v. Bica, 424 U.S. 351, 356, 363 (1976); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Goldstein v. California, *supra,* 412 U.S. at 561.

compensation setoffs as against disability pension benefits (e.g., 29 U.S.C. §1002(1)) but not against retirement pension benefits (29 U.S.C. §1002(2)).

I believe it is unnecessary to outline the historical basis of workmen's compensation or the obviously strong local interest New Jersey has in protecting and compensating its residents. I will note, however, that ERISA itself allows for a certain autonomy in respect to state workmen's compensation. 29 U.S.C. §1003(b)(3). Although other courts might rule differently,[2] I feel that the New Jersey statute, N.J.S.A. 34:15-29, barring workmen's compensation setoffs against employee retirement pension benefits is not preempted or superceded by ERISA, 29 U.S.C. §1144(a).

B. The Offset Provision and 29 U.S.C. §1053.

In a similar fact situation Judge Lacey recently held that a workmen's compensation offset is void as a forfeiture[3] in contravention of 29 U.S.C. §1053(a). *Buczynski v. General Motors Corp.*, 456 F. Supp. 867, 870-871 (D.N.J. 1978). I concur with his well-reasoned opinion.

Furthermore in a motion for reconsideration[4] in the *Buczynski* case Judge Lacey was faced with the exact point the defendant in this action raises. Namely, how treasury regulation §1.411(a)-4(a) defining nonforfeitability effects 29 U.S.C. §1053. The opinion includes this simple analysis of the problem:

---

2. *See*, e.g., Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977).

3. *See also*, Utility Workers Union v. Consumers Power Co., 453 F. Supp. 447 (E.D. Mich. 1978); Riley v. MEBA Pension, 570 F.2d 406 (2d Cir. 1977); *but see*, Bordine v. Evans Products Co., 453 F. Supp. 19 (E.D. Mich. 1978).

4. Opinion filed December 20, 1978.

> . . . 29 U.S.C. §1002(19) provides the definition. Under this section, only the exceptions specifically included in §1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in §1053(a)(3) are exceptions to §1002's definition of nonforfeitability. *See, Riley v. MEBA Pension Trust, supra,* 570 F.2d at 409; *Utility Workers Union v. Consumer Powers Co., supra,* 453 F. Supp. at 456; *Keller v. Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005, 1008 (N.D. Ohio 1976). (footnote omitted)

Thus the offset provision is void as a forfeiture and must be removed from the pension plan.

C. National Labor Relations Act.

Defendant asserts that N.J.S.A. 34:15-29 is unconstitutional in that it intrudes upon and conflicts with the National Labor Relations Act (hereinafter NLRA), 29 U.S.C. §141 et seq., which provides for the unfettered right of an employer and union to bargain collectively as to the terms and conditions of employment.

This is actually another preemption argument. Suffice it to say that New Jersey has a strong local interest in maintaining a competent workmen's compensation program. As the Supreme Court noted in *Lodge 76, Machinists v. Employment Relations Committee,* 427 U.S. 132 (1976):

> . . . Federal labor policy as reflected in the National Labor Relations Act, as amended, has been construed not to preclude the States from regulating aspects of labor relations that involve 'conduct touch[ing] interests so deeply rooted in

> local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act.' *San Diego Unions v. Garmon,* 359 U.S. 236, 244 (1959).

427 U.S. at 136. I therefore conclude that the NLRA does not preempt or preclude the New Jersey Workmen's Compensation statute in question.

D. The Contract Clause.

Although ERISA's nonforfeiture provision invalidates the pension plan's offset provision, a brief discussion of the defendant's Contract Clause[5] argument is in order. Basically, defendant contends that N.J.S.A. 34:15-29 is unconstitutional because it has an unfair retroactive impact on the contractual obligations of the parties.

The recent case of *Allied Structural Steel Co. v. Spannus,* ____ U.S. ____, 57 L.Ed. 2d 727 (1978), primarily concerns itself with the Contract Clause. It points out that though the contract clause "is not . . . the draconian provision that its words might seem to imply"[6] there must be "*some* limits upon the power of a state to abridge existing contractural relationships."[7]

The historical prospective of contract clause cases suggests a number of considerations including, but not limited to: impairment of contractual relationship, public policy of the law in question, whether or not it has a retroactive effect, and reasonableness. Although it is clear that Raybestos will have to

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5. Article I, Section 10 of the United States Constitution provides that, "(n)o state shall . . . pass any . . . law impairing the obligations of contracts."

6. 57 L.Ed. at 733.

7. 57 L.Ed. at 734, emphasis in original.

expend more money than it originally planned due according to N.J.S.A. 34:15-29 it does not reach the level noted in *Spannus* where the company had to *retroactively* fund an employee benefit program to meet the criteria of the questioned law. Indeed, in the instant case, only payments after the implementation of the New Jersey Statute are contested. I think New Jersey has a strong policy interest in their workmen's compensation program and conclude that the contract clause does not bar or invalidate the New Jersey statute in question.

III. Conclusion

For the reasons stated above I find for the plaintiffs in this action. They are entitled to a permanent injunction that there be no more deductions from their monthly pension benefits as a setoff for Workmen's Compensation Benefits. Further that they are entitled to damages in the amount heretofore offset plus interest.

An appropriate order in accordance with this opinion shall be submitted by plaintiff within seven (7) days.

Very truly yours,

s/ Lawrence A. Whipple
Lawrence A. Whipple
Senior Judge, U.S.D.C.

LAW:jaa

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,

Appellees

v.

THE GENERAL MOTORS CORPORATION,

Appellant

STATE OF NEW JERSEY,

Intervenor

(D.C. Civil No. 77-1644)

No. 79-1534

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Appellees

v.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellants

STATE OF NEW JERSEY,

Intervenor

Appendix B

(D.C. Civil No. 78-0434)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: January 8, 1980

Before: GIBBONS, ROSENN and GARTH, *Circuit Judges*

WEINER, STAUBACH, EDELSON & HOPMAYER
LESTER WEINER, ESQ.
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OPINION OF THE COURT

(Filed February 15, 1980)

GARTH, *Circuit Judge*

These two appeals pose a single question: whether the Employee Retirement Income Security Act of 1974 (ERISA) or the laws of New Jersey invalidate the provision of the pension plans of defendants General Motors and Raybestos-Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute. We conclude that these offset provisions are not unlawful under ERISA, and that the New Jersey statute prohibiting them is preempted by ERISA. We therefore reverse the district court orders which enjoined such offsets and which required payment to pension beneficiaries of those amounts which the pension trustees had offset in the past.

I.

Both these cases present similar fact patterns,[1] and

1. No material facts are in dispute in either case. In *Alessi*, all facts were stipulated. In *Buczynski*, the parties filed a stipulation of facts and the plaintiffs presented, at the instance of the district court, the testimony of Hubert Clodfelter. Clodfelter was a union negotiator for the United Auto Workers in 1970 when the GM pension plan was under consideration. He testified about the meaning of the "unless prohibited by law" clause in the GM offset provision. *See* note 2 *infra*.

procedural histories. General Motors (GM) and Raybestos-Manhattan (Raybestos) maintain pension plans covered by ERISA, 29 U.S.C. §1001 *et seq.* (1976). Both pension plans provide that, under certain circumstances, benefits will be reduced by the amount of Workmen's Compensation payments received by plan participants.[2]

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2. The GM offset clause provides:

> Section 2. Deductions for Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

The Raybestos offset clause provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is

(Cont'd)

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In 1977, New Jersey enacted a statute expressly prohibiting such offset provisions. The statute, which became effective July 14, 1977, added the underscored sentence to N.J. Stat. Ann. §34:15-29 (Supp. 1979), a part of New Jersey's Workmen's Compensation program. The complete section now provides:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

Shortly after this statute went into effect, the plaintiffs brought class actions[3] against the defendants in the New Jersey

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> eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

3. In *Alessi*, the request for class certification was abandoned after the case was removed to the federal courts, and the action was continued on behalf of the named plaintiffs only. In *Buczynski*, the following class was certified by consent of the parties:

> The certified class consists "of those persons who are retired members of the General Motors Corporation

(Cont'd)

state courts. The named plaintiffs in each suit were former employees of the defendants who had recovered Workmen's Compensation judgments against the defendants and whose pension benefits were being reduced as a result.[4] The suits sought permanent injunctions against the offsets and recoupment damages for those offsets, alleged to be unlawful, which had already been made.

Both cases were removed by the defendants to the United States District Court for the District of New Jersey. Both district Court for the District of New Jersey. Both district judges to whom the respective cases were assigned, reached the same result. The district court judge in *Buczynski* issued two published opinions. The first opinion is reported at 456 F. Supp. 867 (D.N.J. 1978). The second opinion, which denied reconsideration, is reported at 464 F. Supp. 133 (D.N.J. 1978). The district court judge in *Alessi* issued a single, unpublished letter opinion.

Although the complaints in both cases challenged the offsets only on the basis of the New Jersey statute, both courts

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(Cont'd) Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970. November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." *See* order filed August 9, 1978.

Buczynski v. General Motors Corp., 456 F. Supp. 867, 868 n.1 (D.N.J. 1978).

4. One of the *Alessi* plaintiffs, Helen Vogt, had not yet begun to receive her plan benefits (which were deferred termination benefits rather than retirement payments) by the time suit was filed, and thus had not yet suffered the impact of the offset clause. She was scheduled to begin receiving termination benefits on February 1, 1979.

found the offset invalid under §203(a) of ERISA, 29 U.S.C. §1053(a) (1976) (hereinafter §1053(a)). In so holding, both courts invalidated a regulation issued by the Treasury Department expressly authorizing the offset clauses, 26 C.F.R. §1.411(a)-4(a) (1979).[5] They also held that the New Jersey statute was not superseded by ERISA's preemption clause, 29 U.S.C. §1144 (1976).[6]

General Motors and Raybestos bring these appeals, challenging the district courts' conclusions that the offsets are invalid under ERISA and that the New Jersey statute is not preempted. We address these issues in turn.[7]

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5. The *Buczynski* court's first opinion made no mention of the Treasury regulation. The regulation was only considered and found invalid in the opinion responding to GM's motion for reconsideration. *See* 464 F. Supp. at 134-36.

6. The *Buczynski* court also held that it need not reach the preemption claim since it had already found that the offset was invalid under ERISA itself. *See* 456 F. Supp. at 872. Preemption was discussed, however, by assuming *arguendo* that the offset was *not* invalid under ERISA, *see id.* The court concluded that the New Jersey statute was not preempted, *id.* at 872-74.

After the *Buczynski* and *Alessi* opinions were issued, still another opinion of the district court of New Jersey addressing these questions was filed. Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). *Carpenter* diverged from *Buczynski* and *Alessi* by holding that ERISA did, indeed, preempt the New Jersey statute. *See* our discussion *infra* at Part III. The *Carpenter* court reached the same result as its predecessors, however, by holding that the Workmen's Compensation offset was prohibited by ERISA itself.

7. The State of New Jersey has intervened in both *Alessi* and *Buczynski*. In addition, several *amicus* briefs have been filed in *Buczynski*. The United States as *amicus* urges reversal of the district court. So do several steel companies, who are involved in litigation on this same issue in the Western District of Pennsylvania. These steel companies are: Crucible, Inc., Jones & Laughlin Steel Corp., Mesta Machine Co., Pullman-Standard, Shenango, Inc., United States Steel Corp., and Wheeling-Pittsburgh Steel Corp. The individual

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II.

The plaintiffs claim that the defendants' offset is rendered unlawful by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). This section provides in pertinent part:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

A Treasury regulation, however, addresses the permissibility of offsets under ERISA's antiforfeiture provision and expressly authorizes such offsets, declaring them *not* to be prohibited forfeitures. This regulation provides in pertinent part:[8]

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steelworkers, who are suing their employers on this issue, urge affirmance. The steelworkers are Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller, and George Zihol. The Gray Panthers, one of the *amici* permitted to file in *Buczynski*, urge affirmance as well.

8. This Treasury regulation was *not* issued under ERISA's antiforfeiture requirement found at 29 U.S.C. §1053(a) (1976), but rather under an antiforfeiture provision included in the Internal Revenue Code requirements for pension plans, 26 U.S.C. §411(a) (1976). The tax code requirement for pension plans was enacted in Title II of ERISA. ERISA expressly provides that Treasury Department regulations under the tax code pension provisions shall apply to the analogous provisions of ERISA codified in Title 29 of the United States Code. 29 U.S.C. §1202(c) (1976) provides:

> (c) Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation,

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> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. §1.411(a)-4(a) (1979).

In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry with this regulation, which, if held to be valid, would require us to sustain the offset provisions in the General Motors and Raybestos pension plans.

A.

In assessing the validity of 26 C.F.R. §1.411(a)-4(a) (1979), we first turn to a consideration of the character of the regulation. In this court's recent opinion in *Baker v. Otis Elevator Co.*, No. 79-1185 (3d Cir., Nov. 13, 1979), which also concerned the validity of a Treasury regulation interpreting a

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> vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter [which include 29 U.S.C. §1053(a)]. Except as otherwise expressly provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

We thus conclude that the Treasury regulation issued under the antiforfeiture requirement of 26 U.S.C. §411(a) (1976) must, if valid, control our interpretation of 29 U.S.C. §1053(a) (1976) as well. None of the parties here contends otherwise. This issue is discussed at greater length in Baker v. Otis Elevator Co., No. 79-1185, slip. op. at 5-8 (3d Cir., Nov. 13, 1979).

provision of ERISA, we recognized a distinction between two types of administrative regulations, with a corresponding distinction in the appropriate standard of review. We there stated:

> There can be no question but that the regulation with which we are here concerned is a legislative regulation which was issued pursuant to a clear delegation of rule making authority, *see* U.S.C. §1202(c) (1976). As Professor Davis has explained,
>
> A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.
>
> The distinction between the two kinds of rules is fundamental. . . . Valid legislative rules have about the same effect as valid statutes; they are binding on courts. . . .
>
> [By contrast, however,] [c]ourts always have power to substitute their judgment for administrative judgment as to the content of interpretative rules, but they refrain in varying degrees from substituting judgment in various circumstances. . . .
>
> 2 K.C. Davis, Administrative Law Treatise, §7:8 at 36-37 (1979). We recognize the distinction in the nature of the two types of rules, leading in turn to a distinction in our standard of review. Our scope of review of legislative rules is far

> more restricted than the scope of our review of interpretative rules. *See id.*, at 37.

Slip. op. at 9-10.

After an analysis of the Supreme Court's decision in *Batterton v. Francis*, 432 U.S. 416 (1977), which addressed the same issue, we concluded in *Baker* that, to sustain a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole," slip op. at 11-12.

As in *Baker*, the Treasury Department regulation at issue here is plainly legislative in nature; it was issued pursuant to the same delegation of rule-making power as the regulation in *Baker*, which was there held to be legislative. *See* slip op. at 9; 29 U.S.C. 1202(c) (1976). It is thus subject to the limited review prescribed in *Baker*.[9]

The plaintiffs contend that the Treasury regulation must be struck down because it is inconsistent with the governing statutory provision, ERISA's antiforfeiture requirement, 29 U.S.C. §1053(a) (1976). Before turning to their claim, we think it is appropriate to acknowledge that fidelity to the standard of review set forth in *Baker* and *Batterton, supra*, requires that a legislative regulation be invalidated only for a clear and manifest conflict with the governing statute. Overturning a legislative regulation where the statute may arguably be given conflicting readings, or where the conflict between the regulation and the

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9. Neither district court here recognized that 26 C.F.R. §1.411(a)-4(a) (1979) is a *legislative* regulation. Other courts that have invalidated this regulation have failed as well to recognize this salient characteristic. *See* note 10 *infra*. By failing to accord this regulation the appropriate degree of deference, these courts have impermissibly substituted their own judgment as to the interpretation of the statute for that of the Treasury Department.

statute is not plain, does violence to the congressional intent to delegate rule-making authority to the administrative agency. Approached from this perspective, the conclusions reached by the district courts in *Buczynski* and *Alessi,* that the regulation is inconsistent with 29 U.S.C. §1053(a) (1976), cannot be sustained: The legislative history affirmatively supports the Treasury regulation, and, at the very least, any conflict between the regulation and the statute, if one indeed exists, is clearly insufficient to mandate invalidation.

B.

The district courts here, as well as the other courts that have invalidated this regulation,[10] make similar syllogistic arguments to demonstrate the conflict with ERISA which they perceive. They begin with §1053(a), which provides broadly that pension benefits must be nonforfeitable. They then focus on §1053(a)(3), which specifically exempts certain pension plan provisions from the nonforfeitability rule. The list of these exceptions includes, *inter alia,* nonpayment of benefits if the plan participant dies, §1053(a)(3)(A), and suspension of benefits if the participant takes a job with an employer of benefits if the participant takes a job with an employer in the same industry, §1053(a)(3)(B). This list, however, does not include offsets for Workmen's Compensation. Finally, these district courts add to §1053(a) the definition of "nonforfeitable" found in 29 U.S.C. §1002(19) (1976), which provides:

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10. In addition to *Buczynski* and *Alessi,* offset provisions have been declared unlawful, and the Treasury regulation has been invalidated, in Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wis. 1979); Utility Workers' Union v. Consumers Power Co., 453 F. Supp. 447 (E.D. Mich. 1978), *appeal docketed,* No. 78-1402 (6th Cir., August 2, 1978); and Carpenter Technology Corp. v. Boyton. No. 78-1415 (D.N.J., Dec. 12, 1979). Offset provisions, and the Treasury regulation authorizing them, have been *upheld* in Bordine v. Evans Products Co., 453 F. Supp. 19 (E.D. Mich. 1978); Pavlovic v. Chrysler Corp., No. 7-70438 (E.D. Mich., Jan. 10, 1978), and Carlson v. Bundy Corp., No. 6-72272 (E.D. Mich. 1977).

> (19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions *shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.* (emphasis added).

Armed with these provisions, these district courts reason as follows: all reductions in benefits are forfeitures; all forfeitures are prohibited by §1053(a), with the sole exceptions being those listed in §1053(a)(3); Workmen's Compensation offsets are not included in the list of permissible forfeitures in §1053(a)(3); *ergo,* Workmen's Compensation offsets are prohibited forfeitures. Thus, they conclude that the Treasury regulation authorizing offsets for benefits provided under Federal or State law is in conflict with ERISA, and is therefore invalid, because it expands the class of permissible forfeitures beyond those specifically set forth in §1053(a)(3). The *Buczynski* district court, in its second opinion, makes the argument as follows:

> Another difficulty with the defendant's interpretation results from ERISA's handling of the term "nonforfeitable". 29 U.S.C. §1002(19) provides the definition. Under this section, only the exceptions specifically included in §1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in §1053(a)(3) are exceptions to §1002's definition of nonforfeitability.

> Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. Treas. Reg. §1.411(a)-4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.

464 F. Supp. at 135-36 (footnotes and citations omitted).

Thereafter, the district court in *Alessi,* relying on the *Buczynski* opinions, reached the same result. *See Alessi v. Raybestos-Manhattan,* No. 78-0434, slip. op. at 5 (D.N.J., Feb. 15, 1979).

While this argument is not without some superficial appeal, the courts' syllogism is defective, and we must reject it. Understanding this defect, however, requires some explanation of the regulation of pension plans by the Internal Revenue Service before and after ERISA was enacted.

Prior to enactment of ERISA in 1974, the Internal Revenue Code set forth a variety of requirements that had to be met by pension plans in order to qualify for favorable tax treatment. One requirement was that the plans be nondiscriminatory. This tax code requirement was set forth in 26 U.S.C. §401(a)(4) & (5). On the passage of ERISA, these sections were amended, but the amendments did not alter the basic aim of the statute. Discrimination in contributions or benefits under a pension plan was still prohibited. These sections now provide in pertinent part:

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(a) Requirements for qualification. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

* * *

(4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—

(A) officers,

(B) shareholders, or

(C) highly compensated.

* * *

(5) . . . [A] plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of the employees under the plan . . . differ because of any retirement benefits created under State or Federal law. . . .

Under these sections, the IRS prior to ERISA had extensive experience with a pension plan provision similar to the offset clause challenged here. That provision was the offset of Social Security benefits against pension benefits. In its interpretation of the clause excerpted above from 26 U.S.C. §401(a)(5), the IRS had long permitted pension plans to offset pension benefits by the amount of Social Security benefits that a plan participant received. The first such regulation was issued in 1943, and it simply reiterated the statutory language quoted above. The current version of this regulation, issued in 1960, provides as follows:

> (b) A plan . . . under which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be discriminatory because of such exclusion or difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401(a).

26 C.F.R. §1.401-4(b) (1979).

The parties do not dispute that this regulation permits offset of pension benefits by the amount of Social Security benefits received.

In enacting ERISA, Congress was familiar with the practice of the IRS allowing such offset provisions. Congress was also aware that the IRS, while allowing such offsets, would not permit any *increase* in the rate of offset based upon any *increase* in the level of Social Security benefits occurring after a retiree began to receive his pension. Congress sought to codify this administrative practice of not permitting an increased offset based upon *increased* Social Security benefits, and did so by enacting §1021(e) of ERISA, which is codified at 26 U.S.C. §401(a)(15) (1976). This section provides:

> (15) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part . . . such benefits are not *decreased* by reason of *any increase* in the benefit levels payable under title II of the Social Security Act or *any increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first receipt of such benefits or the date of such separation, as the case may be. (emphasis added).

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Congress's understanding in enacting this section is made clear in the report of the House Ways and Means Committee:

> Protection is given to retired individuals and individuals who are separated from the service of the employer against reductions in private plan benefits when social security benefit levels increase. In general, under present integration [*i.e.*, offset] procedures, social security benefits attributable to employer contributions are treated as though they were part of the private plan. As a result when the level of social security benefits increases, some integrated plans have reduced the amount of the retirement benefits that they provide for covered employees.
>
> Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and are already receiving integrated plan benefits. The bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. This provision is effective for increases in social security benefits which take place after the date of enactment or on the date of the first receipt of plan benefits or the date of separation from service (whichever is applicable) if that date is later.
>
> These changes do not affect the ability of plans to use the integration procedures to reduce

> the benefits that they pay to individuals who are currently covered when social security benefits are liberalized.

H.R. Rep. No. 93-807, 3 U.S. Code Cong. & Admin. News 4670, 4695-96 (1974).

Despite certain misgivings about offset, or integration practices expressed later in this report, Congress chose *not* to bar the Social Security offset entirely, but merely to prohibit *increases* in the amount of the offset based on *increases* in the amount of Social Security benefits.

A number of conclusions can be drawn from this history, conclusions which shed light on the analysis on which the *Alessi* and *Buczynski* courts relied in striking down the Treasury regulation. In choosing only to limit *increased* Social Security offsets rather than bar them entirely in §401(a)(15), Congress gave its implicit approval to the practice of permitting offsets against pension plan benefits — in that instance, an offset of Social Security benefits against pension plan benefits. Further, since §401(a)(15) was enacted at the same time as §1053(a)'s requirement that pension benefits be nonforfeitable, we must conclude that the offset of Social Security benefits implicitly approved in the former section was *not* simultaneously rendered illegal by the latter section's requirement of nonforfeitability.

This conclusion reveals the primary defect in the *Buczynski/Alessi* district court analyses. Those courts reasoned, as noted above, that all benefit reductions are forfeitures, and all forfeitures are impermissible except for the four exceptions listed in §1053(a)(3). Yet Congress has approved the Social Security offset, and that offset docs not appear among the permissible forfeitures under §1053(a)(3). Thus, the district courts' reasoning runs afoul of Congress's approval of the Social Security offset. If all reductions in benefits are forfeitures, and all forfeitures are

prohibited with the exceptions listed in §1053(a)(3), then, under the district courts' reasoning, Social Security offsets should also be prohibited. Yet, as we have seen, this is not the case. It is true, as the courts reasoned, that all *forfeitures* are prohibited with the exception of those listed in §1053(a)(3), but it *cannot* be true that all reductions in benefits are necessarily forfeitures. Congress's implicit approval of the Social Security offset compels the conclusion that such an offset is *not* a forfeiture. Thus, the very basis on which the district courts found the Treasury regulation in issue here to conflict with §1053(a) is in error.

The plaintiffs contend, however, that the Workmen's Compensation offset cannot be sustained on the strength of Congress's approval of the Social Security offset. They contend that even if the Social Security offset is not a forfeiture under ERISA, the Workmen's Compensation offset *is*. Social Security benefits and pension benefits, they point out, are both designed to compensate for wages lost as a result of old age, and therefore the Social Security offset simply avoids a duplication of benefits directed to the same end. Workmen's Compensation, by contrast, is designed to compensate for losses flowing from employment related injuries; thus, the Workmen's Compensation offset, unlike the Social Security offset, cannot be defended as a means to avoid duplication of benefits.

The plaintiffs' argument here fails to recognize the breadth of the Social Security program. Social Security provides benefits for *disabilities, see* 42 U.S.C. §423 (1976), as well as benefits for old age. Thus, the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits. The Social Security offset, since it includes an offset of disability benefits, makes any purported distinction between the Social Security offset and the Workmen's Compensation offset meaningless. The disability offset, included within the Social Security offset, thus compels

us to reject any purported distinction between Social Security offsets and Workmen's Compensation offsets.

And the same argument may be made with respect to benefits provided under the Railroad Retirement Act, 45 U.S.C. §231 *et seq.* (1976). The same implicit congressional approval of offsets of Social Security benefits that appears in 26 U.S.C. §401(a)(15)(1976) is accorded to offsets of Railroad Retirement Act benefits in 29 U.S.C. §1056(b)(1976).[11] Railroad retirement benefits include payments for disability as well as payments for old age. *See* 45 U.S.C. §231a(a)(1)(iv) & (v) (1976). Thus, Congress has implicitly approved two disability offsets against retirement payments. As a result, reliance on the difference in the character of the offsets (retirement benefits as opposed to disability benefits) is misplaced.

The conclusion that not all benefit reductions are forfeitures; that, specifically, a Social Security offset is not a forfeiture; and that the district courts' reasoning is erroneous, is enough by itself to require upholding the Treasury regulation under the review of legislative regulations prescribed by *Baker v. Otis Elevator* and *Batterton v. Francis.* Once we conclude that Social Security offsets are not forfeitures, in the absence of clear evidence that Congress intended to prohibit Workmen's Compensation offsets, it cannot be said that a regulation allowing Workmen's Compensation offsets is so contrary to

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11. 29 U.S.C. §1056(b) provides in pertinent part:

> [A] plan may not *decrease* benefits of such a participant by reason of any increase in the benefit levels payable under title II of the *Social Security Act or the Railroad Retirement Act of 1937,* or any *increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation. (emphasis added).

ERISA that it cannot stand. Thus, we conclude that there is an insufficient basis on which to strike down the regulation.

C.

Our conclusion that a proper interpretation of ERISA requires giving binding effect to this regulation receives further support in the legislative history of that Act. That history demonstrates to our satisfaction that Congress did not disapprove of Workmen's Compensation offsets as well as Social Security offsets.

In the course of IRS administration of the nondiscrimination requirement for pension plans under 26 U.S.C. §401(a)(4) & (5)(1976), the Service issued a revenue ruling explicitly approving an offset for Workmen's Compensation:

> Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.
>
> The effect of section 401(a)(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar program, to be used for comparative purposes. *See* Part 4(j) of Revenue Ruling, 65-178, C.B. 1965-2, 94. A program, like the social security program, that requires employer contributions and makes benefits available to the general public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.

> Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.
>
> Since the benefits payable under a *workmen's compensation law or occupational diseases law* are available to the general public, it is held that *benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan* in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer. (emphasis added).

Rev. Rul. 68-243, 1968-1 C.B. 157, 158.

The substance of this ruling has been republished by the IRS on two occasions.[12]

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12. In 1969, the IRS published an extensive Revenue Ruling consolidating and updating the rules on qualification of pension plans under 26 U.S.C. §401 (1976). This ruling contained the same position expressed in Revenue Ruling 68-243:

> (4) *Integration With Benefits Provided Under Other Public Programs.* — Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state of Federal program that, like the social security program, requires

(Cont'd)

Appendix B

The legislative history of ERISA indicates that Congress was familiar with the IRS rules on integration of benefits in pension plans, and intended that these rules be preserved. The report of the Conference Committee states:

> Moreover, the conferees intend that the anti-discrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H. Conf. Rep. No. 93-1280, 3 U.S. Code Cong. & Admin. News 5038, 5058 (1974).

This history of IRS practice with respect to Workmen's Compensation offsets, and of congressional preservation of the antidiscrimination rules, suggests that, if anything, Congress approved of Workmen's Compensation offsets. Thus, the evidence indicates that the Treasury regulation in issue here conforms to congressional intent. Accordingly, because the

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(Cont'd) employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. *See* Rev. Rul. 68-243, C.B. 1968-1, 157. (emphasis added).

Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 61, 72.

This same provision was included without change in a special IRS publication in 1972. Internal Reveneue Service, Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

regulation is not contrary to § 1053(a) and the provisions of ERISA as a whole, we must sustain its validity.[13]

---

13. An additional argument in support of the position taken by GM and Raybestos was made by the *amicus* steel companies. They called our attention to a proposal made in Congress by Senators Harrison Williams and Jacob Javits, two of the original sponsors of ERISA. The proposal, if enacted into law, which it was not, would have prohibited Workmen's Compensation offsets. The proposal states:

> (a) Section 206(b) of such Act [ERISA] is amended
>
> * * * *
>
> (3) by adding at the end thereof the following new sentence: "A pension plan may not reduce or suspend retirement pension benefits being received by a participant or beneficiary or retirement pension benefits in which a participant who is separated from the service has a nonforfeitable right by reason of any payment made to the participant or beneficiary by the employer maintaining the plan as the result of an award or settlement under or pursuant to a workers' compensation laws."

As we understand the argument, the steel companies contend that there would have been no need for the introduction of such a proposal unless ERISA as originally enacted, and as currently in force, permitted Workmen's Compensation offsets.

While certainly plausible, we do not attribute much weight to this argument. The difficulty with it, as with all arguments of this nature, is that the understanding of the amendment's sponsors is open to conflicting interpretations. It is possible that the sponsors believed that such offsets were permissible under the original ERISA. It is also possible, however, that they believed that such offsets were *impermissible* under ERISA as enacted, and sought the amendment to override the Treasury regulation that erroneously, in their view, authorized such offsets. Thus, the argument cuts both ways.

Two additional arguments, attacking our conclusion that the regulation is valid, are made by *amici* Gray Panthers and Steelworkers. Neither of these arguments merits discussion. They argue that the regulation conflicts with 29

(Cont'd)

Appendix B

III.

Our conclusion that the Treasury regulation must be sustained does not, by itself, require granting judgment in favor of the defendants. For even if ERISA does not prohibit the Workmen's Compensation offset in the GM and Raybestos pension plans, New Jersey's 1977 statute *does*. This statute, as noted earlier, provides in relevant part:

> The right of compensation granted by this chapter [the workmen's compensation act] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

N.J. Stat. Ann. §34:15-29 (Supp. 1979).

The statute, of course, prohibits the offset clause challenged here, and the defendants do not contend otherwise. They do claim, however, that this statute is superseded by ERISA's preemption provision, 29 U.S.C. §1144(a)(1976).[14] This section states:

(Cont'd)

U.S.C. §1056(d)(1) (1976), which provides that pension plan benefits "may not be assigned or alienated," and with 29 U.S.C. §1103(c)(1) (1976), which provides that "the assets of a plan shall never inure to the benefit of any employer, and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." In our opinion, the discussion and analysis found in part II, *supra,* which demonstrates an overriding congressional intent to permit Workmen's Compensation offsets against pension benefits, disposes of these contentions as well.

14. The State of New Jersey, which has intervened in both *Buczynski* and *Alessi,* asks us to abstain from deciding the preemption question. It suggests that if we await a New Jersey state court interpretation of the statute, it may

(Cont'd)

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> (a) Except as provided in subsection (b) of this section,[15] the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The district court judge in *Buczynski,* despite his conclusion that the offset provision was unlawful under ERISA itself, nevertheless discussed the preemption issue. The district court in *Buczynski,* followed thereafter by *Alessi,* concluded that the New Jersey statute was not preempted:

> It is true that under ERISA, 29 U.S.C. §1144(a), all state laws which "relate to" any

(Cont'd)

obviate our consideration of the preemption claim. The state suggests that the New Jersey courts are likely to hold that N.J. Stat. Ann. §34:15-29 (Supp. 1979) protects employees who obtained Workmen's Compensation judgments after the statute went into effect. Since all the plaintiffs in *Alessi* and all the named plaintiffs in *Buczynski* recovered their judgments before the effective date of the statute, it does not, New Jersey argues, protect them and there is no need to determine whether the statute is preempted by ERISA.

However, we decline to abstain for two reasons. First, the construction of the statute that New Jersey proposes will not forever remove the need for consideration of the preemption question. It will simply postpone consideration until a claim is made by an employee who recovered a Workmen's Compensation award after July 14, 1977 and it appears to us that such a claim is not far off. Second, and of greater importance, the certified class in *Buczynski* appears to include persons who recovered Workmen's Compensation judgments after the statute's effective date. *See* note *3 supra.* Thus, there are plaintiffs in this suit who are protected by the statute regardless of how the New Jersey courts may construe the statute. In this posture, then, we are obliged to resolve the preemption claim.

15. None of the exceptions referred to are applicable here, and the plaintiffs do not argue to the contrary.

> employee benefit plan covered by ERISA are superseded. Although the New Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. §1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. . . .
>
> Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. §1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here.

456 F. Supp. at 872-73 (citations omitted).

Our reading of ERISA satisfies us that ERISA *does* preempt N.J. Stat. Ann. §34:15-29 (Supp. 1979). Thus, we cannot agree with the district courts that have concluded otherwise.[16] The primary purpose of the statute, and its direct

16. As previously noted, *see* note *6 supra,* still another New Jersey district court has addressed this preemption question, and agrees with our conclusion that the New Jersey statute is preempted by ERISA. *See* Carpenter Technology Corp. v. Boyton, No. 78-1415, slip op. at 5-9 (D.N.J., Dec. 12, 1979).

effect, is to prohibit pension plans from offsetting Workmen's Compensation benefits against pension retirement benefits. It simply cannot be said that this statute does not concern pension plans *qua* pension plans (*Buczynski*), or that its effect on such plans is merely collateral (*Alessi*). In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans; this purpose negates the characterization of the statute attributed to it by the New Jersey district courts.

Further, ERISA preempts state statutes that *"relate to* any employee benefit plan," 29 U.S.C. §1144(a) (1976) (emphasis added). The view taken by the *Buczynski* court, that ERISA preempts only statutes concerning "pension plans *qua* pension plans," could be accepted only if ERISA's preemption clause were much more narrowly drawn than it is. Here, the preemption clause, reaching statutes that "relate to" pension plans, has an obviously broader scope.

In noting that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," 456 F. Supp. at 872, the district court in *Buczynski* appears to concede the difficulty of its narrow interpretation. The court reasoned, however, that Congress could not have intended the term to be given its full breadth. Yet the legislative history of the clause, as well as the plain meaning of its language, belie this claim. The legislative history of the clause has been detailed elsewhere and we need not repeat it here. *See Wadsworth v. Whaland,* 562 F. 2d 70, 76-77 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan,* 454 F. Supp. 914, 915-17 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes,* 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam,* 571 F. 2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978). We need only note its most prominent features: that the original House and Senate provisions were significantly narrower, and were rejected by the Conference

Committee in favor of the current provision; and that explanations of the Conference substitute given on the floor of both chambers make plain that the preemptive intent is just as broad as its language suggests. Thus, it is clear that the preemption provision is intended to be read in its normal dictionary sense, and that the New Jersey statute prohibiting Workmen's Compensation offsets cannot stand.[17]

IV.

We conclude that the Workmen's Compensation offset in General Motors's and Raybestos's pension plans is not a forfeiture rendered invalid by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). In so concluding, we sustain the Treasury regulation expressly authorizing provisions of this type, 26 C.F.R. §1.411(a)-4(a) (1979). We also conclude that the New Jersey statute that prohibits these offsets, N.J. Stat. Ann. §34:15-29 (Supp. 1979), is preempted by ERISA, 29 U.S.C. §1144(a) (1976).

In light of our conclusions, which are contrary to the conclusions reached by the district courts in both *Buczynski* and *Alessi,* we will vacate the respective orders dated April 3, 1979 (*Buczynski*) and March 1, 1979 (*Alessi*) which permanently enjoin the defendants from offsetting Workmen's Compensation benefits and which required that reimbursement be made for amounts offset in the past; we direct that the district courts enter judgment for the defendants. Each side shall bear its own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

17. Raybestos, in the district court in Alessi, contended that the New Jersey statute should be struck down on at least two other grounds. First, that the statute was preempted under the National Labor Relations Act, and, second, that it was an unconstitutional impairment of the obligation of contracts. The court rejected both of these attacks, slip op. at 8-9. In light of our conclusion that the statute is preempted by ERISA itself, we need not reach these issues.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1534

ALESSI, JOSEPH, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKS, HELEN VOGT AND T. EDWARD WHITE

vs.

RAYBESTOS-MANHATTAN, INC., AND RAYBESTOS-MANHATTAN, INC., EMPLOYEE RETIREMENT PLAN, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Appellants

STATE OF NEW JERSEY,

Intervenor

(D. C. Civil No. 78-0434)

No. 79-1668

BUCZYNSKI, Henry, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED

vs.

THE GENERAL MOTORS CORPORATION,

Appellant

Appendix C

STATE OF NEW JERSEY,

Intervenor

(D. C. Civil No. 77-1644)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSENN and GARTH, *Circuit Judges*

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated April 3, 1979 and appealed at our No. 79-1668, and dated March 1, 1979, and appealed at our No. 79-1534, be, and the same are hereby vacated and the causes are remanded to the said District Courts for entry of judgments for the defendants, all in accordance with the opinion of this Court. Each side shall bear its own costs.

ATTEST:

s/ Thomas F. Quinn
Clerk

February 15, 1980

Certified as a true copy and issued in lieu of a formal mandate on March 27, 1980.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D — ORDER DENYING PETITION FOR REHEARING DATED MARCH 19, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1534

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Plaintiffs-Appelless,

v.

RAYBESTOS-MANHATTAN INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Defendants-Appellants

STATE OF NEW JERSEY

Intervenor

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and SLOVITER

The petition for rehearing filed by plaintiffs-appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Leonard I. Garth
Judge

Leonard I. Garth, U.S.C.J.

Dated: March 19, 1980

APPENDIX E — NOTICE OF APPEAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket #79-1534

Joseph Alessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt and T. Edward White,

Plaintiff-Appellants

v.

Raybestos-Manhattan, Inc., and Raybestos-Manhattan Inc. Employee Retirement Plan, jointly, severally or in the alternative,

Defendant-Appellees

Notice is hereby given that Joseph Alessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt, and T. Edward White, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order of the United States Court of Appeals for the Third Circuit reversing the Judgment of the United States District Court for the District of New Jersey and dismissing plaintiff-appellants' complaint, entered in this action on February 15, 1980. Plaintiff-Appellants' Petition For Rehearing in Banc was denied on March 19, 1980.

This appeal is taken pursuant to 28 U.S.C. 1254(2).

GELMAN & GELMAN
Attorneys for Plaintiff-Appellants
45 Church Street
Paterson, N.J. 07505

/s/
MICHAEL S. SCAROLA

DATED: April 22, 1980

APPENDIX F — LETTER ACKNOWLEDGING FILING OF NOTICE OF APPEAL

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

Thomas F. Quinn — Telephone

Clerk — 215-597-2995

May 2, 1980

Michael S. Scarola, Esquire
Gelman & Gelman
45 Church Street
Paterson, NJ 07505

Re: Joseph Alessi, et al. vs. Raybestos-Manhattan, Inc., et al
State of New Jersey, Intervenor No. 79-1534

Dear Mr. Scarola:

This will acknowledge receipt on April 25, 1980 of Plaintiff-Appellants "Notice of Appeal to the Supreme Court of the United States" in the above-entitled case.

The Notice of Appeal has been filed as of April 25, 1980, placed on our docket and in the files of the case in this Court.

Very truly yours,

s/ T.F. Quinn
Clerk

bjr

cc: S. Joseph Fortunato, Esquire
Michael S. Bokar, Esquire

APPENDIX G — OPINION OF THE HONORABLE CLARKSON S. FISHER FILED DECEMBER 12, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 78-1415

CARPENTER TECHNOLOGY CORPORATION, et al,

Plaintiffs,

v.

JAMES E. BOYTON,

Defendant.

HON. CLARKSON S. FISHER

The Carpenter Technology Corporation (hereinafter "Carpenter") and others associated with the Pension Plan for Employees of Carpenter (hereinafter "Plan") bring this action for a declaratory judgment, 28 U.S.C. §2201, and for related relief. They seek clarification of the rights of James E. Boyton, a retired Carpenter employee, under the Plan. At issue is the validity of a Plan provision which permits the plaintiffs to deduct from Boyton's monthly retirement pension benefits the amount of a workmen's compensation award he receives pursuant to a decree of the state of New Jersey. This court has jurisdiction to determine this controversy pursuant to §502 of the Employees Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132. Presently before the court are cross motions for summary judgment. *F.R. Civ. P.* 56. Since no genuine issues of material fact exist, resolution by summary judgment is appropriate.

Appendix G

I. BACKGROUND

A. Description of the Plan.

The Plan is the fruit of collective bargaining between Carpenter and the United Steelworkers of America. It was initially adopted in 1949. At the time Boyton retired, the Plan contained amendments effective August 1, 1972. *See* Complaint, filed June 23, 1978, Ex. A. Subsequent to his retirement the Plan was amended and restated effective August 1, 1975 (hereinafter "Restated Plan"). *See id.* Ex. B. Although Boyton received an increase in benefits pursuant to retroactive provisions of the Restated Plan, the pivotal provisions of the Plan were not altered by the 1975 amendments. The Plan and the Restated Plan are collectively referred to as the "Plans".

Section 2 of the Plan and Restated Plan details the retirement options available to Carpenter's employees. When Boyton retired in 1974 the Plan offered six retirement options. In addition to normal retirement, early retirement and disability retirement options, *see* Plan §§2.1, 2.3, 2.4, the Plan provided a 30-year retirement option without regard to age for any employee "who shall have had at least 30 years continuous service". *Id.* §2.2. *See also* Restated Plan §2.3.

Section 3 of the Plan and Restated Plan sets out the method of determining the amout of pension to be awarded a retiree. Pension payments come in two forms. First, a special initial pension amount, or special payment, is granted as a lump sum to all retirees except those receiving disability pensions. Plan §3.1(a); Restated Plan §3.1(a). In addition the Plan provides for a regular pension amount, payable monthly. Plan §3.1(b); Restated Plan §3.1(b). The regular pension amount paid to an employee retiring on the 30-year option is determined in accord with Plan §3.3 and is not at issue here.

Appendix G

Section 3 also provides for certain deductions to be made from the regular pension amount. Deductions are provided in respect of public and other pensions, Plan §§3.8, 3.9, of severance allowances, Plan §3.10, and of occupation disability payments, Plan §3.11. In pertinent part, this last provision states:

> 3.11 Any amount paid to or on behalf of any participant on account of injury or occupational disease incurred in the course of his employment by the Company . . . in the nature of a permanent disability, whether pursuant to Workman's Compensation, Occupational Disease, or similar statutory law, . . . shall be deducted from or charged against any regular pension otherwise payable under the Plan . . .

See also Restated Plan §3.10.

B. Defendant's Work History.

Defendant commenced employment with Carpenter on April 4, 1944 at the age of 17. He worked as a full-time Carpenter employee until his retirement on August 1, 1974 at the age of 47 under Carpenter's 30-year retirement option. Defendant applied for and was awarded both a special payment and regular pension amount. The lump sum special payment was awarded in the amount of $3,141.43. His regular monthly retirement benefit, in the amount of $344.94 per month, commenced on November 1, 1974. Due to upwards adjustments made pursuant to the Restated Plan, as of March 1978 defendant's monthly benefit amounted to $387.64 per month. From November 1, 1974 to March 31, 1978, the total amount of defendant's monthly benefit was $15,194.90.

In December of 1974, after applying for and receiving his regular retirement benefits, defendant filed a petition with the

state of New Jersey, Department of Labor and Industry, Division of Worker's Compensation, seeking an award of compensation benefits pursuant to N.J.S.A. 34:15-7 *et seq.* Defendant's petition was hotly contested, but after lengthy administrative proceedings an order for judgment was entered in March 1978 finding defendant permanently disabled as a result of a 1973 heart attack, an occupational back injury and occupational hearing loss.

The order for judgment awarded permanent disability benefits to Boyton in the amount of $112.00 per week for 360 weeks. The order directed Carpenter to commence the weekly compensation payments retroactively as of August 1, 1974, the date of Boyton's retirement. The Carpenter Pension Board determined, because of the compensation award's retroactive effect, that defendant had been overpaid monthly benefits for the entire period from November 1, 1974 to March 31, 1978. Since the amount of worker's compensation award was greater than the amount of the monthly benefit, the Board determined that defendant had been overpaid as to the entire amount of the benefits paid. The Board also determined to suspend Boyton's regular pension benefits commencing March 1978 for the duration of the period of the disability benefits. To the best of the court's knowledge, those benefits remain suspended to this day. The Board apparently made no attempt to recover the special payment.

Upon receipt of notification of the Board's determinations Boyton threatened suit against plaintiffs. Plaintiffs reacted by filing this suit on June 23, 1978 seeking a declaratory judgment that the Plans and their actions under the Plans are lawful and a money judgment against defendant in the amount of $15,184.90.

C. Legal Issues.

Boyton threatened suit against Carpenter on the grounds that the offset in respect of Workmen's Compensation benefits

violated portions of the New Jersey Workmen's Compensation law. N.J.S.A. 34:15-7 *et seq.* Specifically, Boyton relied upon N.J.S.A. 34:15-29, which provides in relevant part that:

> [T]he right of compensation granted by this chapter may be set off against disability pension benefits or payments, but shall not be set off against employee's retirement pension benefits or payments.

It is clear to the court that Carpenter's actions violate this statute.

Carpenter seeks a declaratory judgment that this statute is invalid. Carpenter contends that the statute has been preempted by ERISA, that it has been preempted by federal labor law, and that it unconstitutionally impairs the obligations of contracts.

Anticipating a position adopted by the defendant in his counterclaim, the amended complaint filed July 20, 1978 also seeks a declaratory judgment that the Plans' offset provisions do not constitute a forfeiture prohibited by the minimum vesting provisions of ERISA §203, 29 U.S.C. §1053. In the alternative, Carpenter contends that the pertinent provisions of ERISA do not apply to Boyton; first, because he retired before the effective date of ERISA, and second, because Boyton retired at the age of 47 prior to attaining "normal retirement age" as that term is used in ERISA §203, 29 U.S.C. §1053. *See* ERISA §3(24), 29 U.S.C. §1002(24).

I will first address the validity of the state statute and then turn to the substantive content of ERISA's vesting requirements.

II. THE VALIDITY OF THE STATE STATUTE.

Carpenter initially argues that the pertinent provisions of the New Jersey statute are preempted by ERISA. Two judges in

this district have addressed this exact issue, each holding that the New Jersey statute was not preempted by ERISA. *Buczynski v. General Motors Corp.*, 456 F. Supp. 867, *aff'd on reh'g*, 464 F. Supp. 133 (D.N.J. 1978) (Lacey, J.), *app. pending*, No. 79-1688 (3d Cir.); *Alessi v. Raybestos-Manhattan, Inc.*, No. 78-434 (D.N.J. Feb. 15, 1979) (Whipple, S.J.).[1] Since I reach a conclusion differing from that of my brethren, I shall set forth my reasoning in some detail.

United States Supreme Court cases explaining the proper application of the Supremacy Clause, U.S. Const. art. VI, cl. 2 are legion. *See, e.g., Mallone v. White Motor Corp.*, 435 U.S. 497 (1978); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *DeCanas v. Bica*, 424 U.S. 351 (1976). Whenever a preemption claim is raised, these cases and others teach that the intent of Congress is the touchstone. *Mallone, supra*, 435 U.S. at 504; *Amalgamated Transit Union v. Byrne*, 568 F.2d 1025, 1028 (3d Cir. 1977).

Congress' intent to preempt an area of state law may be either express or implied. *E.g., Ray, supra*, 435 U.S. at 157, and the Supreme Court has identified three ways in which that intent may be demonstrated. First, Congress may unmistakably ordain that local law be preempted. *Florida Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Second, the "nature of the regulated subject matter may permit no other conclusion but that Congress intended to preempt local law on the subject." *Id.* Third, local law may stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and therefore be preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Rogers v. Larson*, 563 F.2d 617 (3d Cir. 1977), *app. dismissed and cert. denied sub. nom., Larson v. Lockhart*, 439 U.S. 803 (1978); *National State Bank of Elizabeth v. Long.*, 469 F. Supp. 1068 (D.N.J. 1979).

In the present controversy Carpenter's principal argument is that section 514(a) of ERISA, 29 U.S.C. §1144(a), is an

unmistakable expression of Congress' intention to preempt the field of pension benefits law.[2] Section 514(a) provides:

> (a) Except as provided in subsection (b) of this section, the provisions of [Title I: "Protection of Employee Benefit Rights" and Title IV: "Plan Termination Insurance" of this act] shall *supercede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan* described in [ERISA §4(a), 29 U.S.C. §1003(a)] and not exempt in section 4(b) [29 U.S.C. §1003(b)]. This section shall take effect on January 1, 1975.

Carpenter contends that N.J.S.A. 34:15-29 is a state law which relates to the pension plan at issue here and is therefore preempted. I agree.

I believe that the New Jersey statute "relates to" these Plans sufficiently to instigate the preemption command of section 514(a). Judges Lacey and Whipple concluded that the state act did not sufficiently relate to similar covered plans to be preempted. Judge Lacey states in *Buczynski, supra* 456 F. Supp. at 867:

> Although the New Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. §1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation . . . However, the New Jersey statute at issue here is in no way concerned with pension

> plans *qua* pension plans. On the contrary, the statute is solely concerned with the protection of the employee's right to workers' compensation disability benefits. . . .
>
> Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. §1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits. . . .

Judge Whipple essentially concurred with this analysis. *See Aless, supra* at 3-4. Each stressed New Jersey's substantial interest in awarding and protecting compensation benefits and concluded that Congress did not intend to preempt this particular statute. I must respectfully disagree with this conclusion.

Congress' intention to preempt all state regulation of pension plans *qua* pension plans is manifest. 29 U.S.C. §1144(a); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 239 n. 8 (1978); *Malone v. White Motor Corp.,* 435 U.S. 497, 499 & n.1 (1978). *See also Wadsworth v. Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980, 981 (1978); *Hewlitt-Packard v. Barnes,* 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd per curiam,* 571 F.2d 502 (9th Cir. 1978), *cert. denied,* 439 U.S. 831 (1978); *Standard Oil Co. of Cal. v. Agsaluyd,* 442 F. Supp. 695 (N.D. Cal. 1977); *Bell v. Employee Security Benefit Assoc.,* 437 F. Supp. 382 (D. Kan. 1977). I believe, however, that Congress' intention was to preempt more than just state regulation of pension plans *qua* pension plans. Congress expressly preempted *"any and all* state laws insofar as they may now or hereafter *relate to any"* plan. In choosing this language Congress specifically rejected less expansive language with the stated purpose of eliminating endless litigation over the scope of the preemption clause. Congress chose to exercise its preemption

power in its broadest sense. The legislative history to that effect is set out comprehensively in *Wadsworth, supra,* 562 F.2d at 70; *National Carrier's Conference Commission v. Heffernan,* 454 F. Supp. 914 (D. Conn. 1978); *Hewlett-Packard, supra,* 425 F. Supp. 1294, and a plethora of other decisions and will not be repeated here. That history has led numerous courts to conclude that Congress' preemption of the field of pension benefit plans was "virtually total". *E.g., Bell, supra,* 437 F. Supp. at 387.

Section 514(a) has been the basis for striking down such non-pension plan regulations as a state tax measure which imposed upon the organization maintaining a plan a tax amounting to a percentage of the annual benefits paid. *National Carrier's, supra,* 454 F. Supp. 914. It has also been the basis for striking down a state anti-discrimination law directing payment of specific benefits to females. *Pervel Industries, Inc. v. Commission on Human Rights & Opportunities,* 468 F. Supp. 490 (D. Conn. 1978), *aff'd mem.* 603 F.2d 214 (2d Cir. 1979). These cases indicate that ERISA goes far beyond the preemption of only state laws regulating pension plans *qua* pension plans.[3]

The purpose of the preemption clause is to insure that employers doing business in many states are not subject to varying and inconsistent state laws. Congress determined that the amount of an individual's pension benefits should not vary from state to state merely because of the vagaries of state laws which do not regulate pension plans but which clearly have an effect on and relate to such plans. All other things being equal, upholding this statute's validity would mean that similarly situated Carpenter employees in New Jersey and elsewhere would receive different amounts of benefits merely because of the New Jersey law. I do not believe that Congress would approve of such a result.

Judge Lacey decided that the New Jersey statute undoubtedly "relates to" pension plans in the broadest

dictionary sense of the word. I agree. I do not, however, believe that there is any basis for concluding that Congress intended to use the word in any but its ordinary and everyday usage. It is not a term of art.

I therefore conclude that N.J.S.A. 34:15-29 is preempted by ERISA §514(a), 29 U.S.C. §1144(a).

III. EFFECT OF ERISA.

Having determined that the New Jersey statute has no effect on the outcome of this controversy, I must determine the extent to which ERISA governs the outcome. The first of plaintiff's arguments to be addressed must be his contention that the minimum vesting provisions of ERISA are altogether inapplicable because Boyton retired on August 1, 1974, prior to both the enactment of ERISA and the effective date of the minimum vesting requirements of ERISA §203, 29 U.S.C. §1053. Carpenter places primary reliance for this position upon Treas. Reg. 1.411(a)-2(f), which provides:

> The requirements of [I.R.C. §411 (and therefore ERISA §203, 29 U.S.C. §1053)] do not apply to employees who separate from service with the employer prior to the first plan year to which such requirements apply and who never return to service with the employer in a plan year to which [I.R.C. §411] applies.

In this case, Carpenter operated its plan on a calendar year basis and made no election to accelerate the applicability of the relevant ERISA provisions.[4] ERISA §203, therefore, first became applicable to the Plans on January 1, 1976, long after Boyton retired.

On the facts of this case, however, I do not believe that accepting plaintiff's position would lead to the proper result. The

causes of action asserted by both plaintiffs and defendant did not accrue until the entry of the order for judgment and the Board's subsequent determination to suspend defendant's pension. This occurred in 1978. In addition, defendant did not lose all rights to his pension, but only to a portion of it during the 360-week period in which he received disability benefits. I must concur with the reasoning of Judge Friendly in *Riley v. MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), *aff'd after remand,* 586 F.2d 968 (2d Cir. 1978) that such periodic offsets must be viewed as separate "forfeitures" for each month in which the offset is made. *Compare Keller v. Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (N.D. Ohio 1976) *with Riley, supra.* The minimum vesting provisions of ERISA are therefore applicable, in the very least, to monthly offsets occurring after December 31, 1975. Prior to that time, some non-ERISA law must govern.

Turning first to that period of time governed by ERISA, I must determine whether ERISA allows Carpenter to continue to offset defendant's workmens' compensation payments against his future retirement benefits and whether plaintiffs may recoup payments made to defendant from January 1976 to March 1978, inclusive.

The answer to this question depends at the outset upon whether the Plans offset provisions constitute forfeitures prohibited by ERISA §203, 29 U.S.C. §1053(a). Among other requirements not relevant here, section 203 states: "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . ." 29 U.S.C. §1053(a). *See also* I.R.C. §411(a). ERISA defines "nonforfeitable" to mean in relevant part "a claim . . . to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service which is unconditional, and which is legally enforceable against the plan." ERISA §3(19), 29 U.S.C. §1002(19).

Appendix G

Pursuant to authority vested in the Secretary of the Treasury by ERISA §3002(c), 29 U.S.C. §1202(c),[5] the Secretary has promulgated regulations purporting to explain what is meant by the minimum vesting requirements created by ERISA. Treas. Reg. §1.411(a)-4(a) states in pertinent part that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits."

Were the existence of this regulation conclusive, my analysis would proceed no further. The regulation, however, has been challenged as exceeding the authority granted by Congress to the Secretary and as not in compliance with the statute.

In part I of this opinion I explored in some detail the legal issues because I disagreed with the decisions reached by Judges Whipple and Lacey. This time, however, I concur with their reasoning. I will therefore not go into this matter in any detail except to state that, for the reasons expressed in *Buczynski* and *Alessi,* I find that Treas. Reg. 1.411(a)-4(a) is not consistent with the intent of Congress as expressed in 29 U.S.C. 1053 and I.R.C. §411, and that the offset of workmen's compensation benefits against defendant's pension benefits is an impermissable forfeiture under ERISA §203, 29 U.S.C. §1053. *See also Stong v. Bucyrus-Erie Co.,* 472 F. Supp. 1089 (E.D. Wis. 1979).[6]

Whether the offset is unlawful in this particular case, however, depends upon the validity of Carpenter's argument that section 203 does not apply because Boyton has not yet reached "normal retirement age". Reference to 29 U.S.C. §1053 reveals that the nonforfeitability requirement attaches only upon an employee's attainment of "normal retirement age". That term is defined in ERISA §3(24), 29 U.S.C. §1002(24) to mean the earlier of:

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of —

(i) the time the plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

See also I.R.C. §411(a)(8). Pursuant to his statutory authority, the Secretary of the Treasury has promulgated Treas. Reg. 1.411(c)-7(b)(1) to give guidance in determining normal retirement age when not expressly stated in the plan. That regulation provides that "if an age is not specified by a plan as the normal retirement age, then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service."

These statutes and regulations reveal that Congress intended to allow forfeitures of benefits when an employee opts to retire prior to attaining normal retirement age. *See, e.g., Riley v. MEBA Pension Trust, supra,* 580 F.2d at 969-70; *Spitzler v. New York Post Corp.,* 476 F. Supp. 386 (S.D.N.Y. 1979); *Capocci v. General Motors Corp.,* 444 F. Supp. 1306 (D. Haw. 1978). I do not believe, however, that I am presently in a position to finally determine what the normal retirement age is under the Carpenter Plans. Carpenter argues that normal retirement age is 65, the age at which "normal retirement" is allowed under the Plan. *See* Plan §2.1; Restated Plan §2.1. In the alternative, Carpenter contends that since there is no age at which benefits cease accruing solely on account of age or service under the Plans, normal retirement age must be 65 under 29 U.S.C. §3(24)(b).

Defendant has not addressed either of these arguments. The court's independent research, however, indicates the possibility that a plan might have multiple normal retirement ages, and that a specified early retirement option might qualify as a normal retirement age. *See, e.g., Spitzler, supra,* 476 F. Supp. at 388-89. I therefore decline to finally resolve this point until such time as the parties have submitted supplemental briefs on these issues.

Turning now to the time period before the applicability of ERISA, I must determine whether plaintiffs may recover the regular pension payments made from November 1, 1974 through December 31, 1975. Neither party has addressed the question of what law governs this period, but I believe that resolution is possible here without requiring additional briefs.

From November 1, 1974 to December 31, 1974 New Jersey law governs. After December 31, 1974, the ERISA preemption provision is effective, and state law would therefore be inapplicable starting January 1, 1975. At that time, however, the vesting provisions of ERISA are still not applicable. The court is thus faced with a situation where ERISA takes away the only established body of law on a topic yet does not replace it with any express federal law. It is therefore the duty of the court to determine the appropriate rules of decision for this period. *See Schlansky v. United Merchants & Manufacturers, Inc.,* 443 F. Supp. 1054 (S.D.N.Y. 1977); *Amory v. Boyden Associates, Inc.,* 434 F. Supp. 671 (S.D.N.Y. 1976).

The offset must be considered valid in that period of time governed by New Jersey law. *See Renshaw v. U.S. Pipe & Foundry Co.,* 30 N.J. 458 (1959). In fact, N.J.S.A. 34:15-29 was added in 1977 to overrule the cases allowing such offsets.

For the one-year period covering calendar 1975, the appropriate test should be a test of reasonableness. *See Amory, supra,* 434 F. Supp. at 673. Although normally a question of

fact, on the record before me I believe I can safely conclude that the provision is reasonable. I have found that the offset is valid prior to this one-year period because it was considered reasonable under the established case law. It would make little sense to find it unreasonable in this one-year period. I accordingly find that the offset provision was valid at all times prior to the effective date of ERISA's non-forfeiture provisions.

IV. CONCLUSION.

In conclusion I have found that ERISA §514(a), 29 U.S.C. §1144(a), preempts N.J.S.A. 34:15-29. In addition I have found that ERISA §203, 29 U.S.C. §1053, which in large part governs this case, generally prohibits the offset in question but does not prohibit it where, as may be the case here, the employee has not yet attained normal retirement age. Since I have not determined whether Boyton has attained normal retirement age, I cannot yet determine the validity of the continuing offsets. I have, however, found that the offset provision is valid for the period of time prior to the effective date of ERISA §203 in this case.

Since there is no dispute about the amount of monthly benefits which Boyton received from November 1974 to December 1975, I will at the appropriate time enter judgment in plaintiffs' favor in that amount. I request additional briefs on the normal retirement age question within 20 days of the date of this opinion. After resolving that last remaining issue judgment will be rendered on this entire controversy.

Dated: December 12, 1979.

Appendix G

FOOTNOTES

1. Judge Lacey actually found that the New Jersey statute was preempted because it was merely duplicative of the federal law in prohibiting the offset. *See Buczynski, supra,* 456 F. Supp. at 872. Assuming, *arguendo,* that the offset provision did not offend ERISA, Judge Lacey held in the alternative that ERISA 514(a), 29 U.S.C. §1144(a) did not unmistakably ordain that the state statute be preempted. *Id.* at 872-74 & nn. 20, 22.

2. Carpenter also suggests that the New Jersey statute is preempted because it attempts to prohibit what ERISA §203, 29 U.S.C. §1053 and Treas. Reg. 1.411(a)-4(a) promulgated thereunder affirmatively permit and is therefore in direct conflict with the federal law. This contention is discussed *infra* at note 6.

3. ERISA §514(a), 29 U.S.C. §144(a) has also been the basis for striking down state community property laws awarding a divorced spouse an interest in the working spouse's pension benefits, but these decisions are not uniform. *Compare, e.g., Francis v. United Technologies Corp.,* 458 F. Supp. 84 (N.D. Cal. 1978) *with Stone v. Stone,* 450 F. Supp. 919 (N.D. Cal. 1978). Because of this split, I do not rely on these cases. Assuming that such laws are not preempted, they are distinguishable because they affect only the identity of the recipient and not the employer's obligation to pay a specified amount of benefits. *See also* ERISA §206, 29 U.S.C. §1056.

4. ERISA §211(b), 29 U.S.C. §1061(b) provides that the minimum vesting standards of section 203 with regard to plans in existence on January 1, 1974 apply "in the case of Plan years beginning after December 31, 1975." *See also* ERISA §1012(b)(2); I.R.C. §411(b)(2); Treas. Reg. 1.411(a)-2. The Carpenter Plan was in existence on January 1, 1974 and was operated on a calendar year basis. No election was made to accelerate the effective date of the vesting provisions. ERISA

§211(d), 29 U.S.C. §1061(d). *See* Affidavit of Fred R. Huehnergarth, filed May 11, 1979, at ¶5. The first plan year to which section 203 applied therefore was that commencing on January 1, 1976.

5. ERISA §3002(c), 29 U.S.C. §1202(c) provides:

> (c) Regulations prescribed by the Secretary of the Treasury under [I.R.C. §§410, 411 and 412] shall also apply to the minimum participation, vesting, and funding standards set forth in [ERISA §§201, 202, and 203]. Except as otherwise expressly provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury . . . in a manner inconsistent with the way such regulations apply under [I.R.C. §§410(a), 411 and 412].

6. Holding, as I do, that ERISA §203, 29 U.S.C. §1053, generally prohibits the offset at issue here, I must reject Carpenter's claim, see note 2, *supra*, that N.J.S.A. 34:15-29 is preempted because it prohibits that which ERISA expressly permits.

No. 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

On Appeal from the Final Order of the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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APPEAL DOCKETED JUNE 10, 1980

PROBABLE JURISDICTION NOTED NOVEMBER 3, 1980

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APPENDIX 1

Relevant Docket Entries

1) Complaint filed in the Superior Court of New Jersey January 17, 1978.

2) Stipulation extending Time to Answer dated February 17, 1978.

3) Petition for Removal and Notice of Removal served on or about March 5, 1978.

4) Answer served on or about March 9, 1978.

5) Notice of Motion for Remand filed on or about March 25, 1978.

6) Plaintiffs Pre-Trial Memorandum filed on or about May 27, 1978.

7) Defendants Pre-Trial Memorandum served on or about June 7, 1978.

8) Pre-Trial Order entered November 30, 1978.

9) Statement of Stipulated Facts filed on or about December 24, 1978.

10) Opinion of the Honorable Lawrence A. Whipple, United States District Court, District of New Jersey filed February 15, 1979.

11) Order for Judgment in the United States District Court entered March 1, 1979.

12) Defendants Notice of Appeal to the United States Court of Appeals for the Third Circuit filed March 19, 1979.

Appendix 1

13) Defendants Motion for Stay of Payment of Damages and Order Granting Stay of Payment of Damages and approving supersedeas bond entered March 21, 1979.

14) Defendants Notice of Motion for Stay of Injunctive Relief served on or about March 22, 1979.

15) Consent Order Granting Stay of Injunctive Relief entered May 3, 1979.

16) Motion for Leave to Intervene filed by the Attorney General of the State of New Jersey on or about August 9, 1979.

17) Order Granting the Attorney General of New Jersey Leave to Intervene entered on September 7, 1979.

18) Opinion of the United States Court of Appeals for the Third Circuit filed February 15, 1980.

19) Plaintiffs Petition for Rehearing in Banc filed on or about February 27, 1980.

20) Order Denying Plaintiffs Petition for Rehearing in Banc entered March 19, 1980.

21) Judgment of the United States Court of Appeals for the Third Circuit issued March 27, 1980.

22) Order and Judgment on Remand to the United States District Court filed on or about April 18, 1980.

23) Notice of Appeal to the Supreme Court of the United States filed April 25, 1980.

24) Order of Dismissal as to plaintiff, Helen Vogt entered July 14, 1980.

APPENDIX 2

Plaintiffs' Complaint

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION—PASSAIC COUNTY

DOCKET No. C-1707-77

Plaintiffs, on behalf of themselves and all those persons similarly situated for their Complaint, allege:

FIRST COUNT

1. The named plaintiffs reside at the following post office addresses:

Joseph Alessi, 3 Redstone Lane, Lodi, New Jersey

Raymond Buisson, 98 Kossuth Street, Wallington, N.J.

Stephen Michalski, 51 Stern Avenue, Wallington, N.J.

Charles Repka, 76 Tuella Avenue, Elmwood Park, N.J.

T. Edward White, 105 Viola Avenue, Clifton, N.J.

Helen Vogt, 28 Pepper Road, Towaco, N.J.

2. This action is brought on behalf of the plaintiffs as well as on behalf of each and all other persons similarly situated. Such persons are so numerous as to make it impracticable to bring them all before the Court.

3. Plaintiffs claims are typical of the claims of such persons, the plaintiffs will adequately and fairly represent

the interests of all such persons, there are questions of law and fact common to all plaintiffs and all such other persons, and the prosecution of individual actions by individual members of the class would establish incompatible standards of conduct for the parties opposing the class.

4. Plaintiffs for themselves and for and on behalf of all persons similarly situated complain of the defendants and allege that they, are all former employees of the defendant, Raybestos Manhattan, Inc.

5. They are contractually entitled to Retirement Income payments from defendants, Raybestos Manhattan Inc. Employee Retirement Plan, and Raybestos Manhattan, Inc,

6. They have secured Judgments against defendant, Raybestos Manhattan Inc. in the New Jersey Department of Labor and Industry, Division of Worker's Compensation, pursuant to the applicable provisions of N.J.S.A. 34: 15-1 et seq.

7. Defendants have failed to make payments to the plaintiffs and such other persons as per certain provisions of the Raybestos Manhattan Inc. Employee Retirement Plan.

8. Defendants have set off and continue to set off sums of the compensation Judgments, as set forth in Paragraph 6 hereof, against the retirement pension benefits or payments to which the plaintiffs and such other persons are entitled contrary to the provisions of N.J.S.A. 34:15-29.

9. Demand has been made upon the defendants to cease and desist in said illegal practices and to repay all sums

due to plaintiffs but the defendants have failed, neglected and refused to so comply.

10. No action is pending in any Court involving the matters herein in dispute.

WHEREFORE, Plaintiffs demand:

A. Declaratory Judgment that the set offs by the defendants are and were illegal and shall cease;

B. That this Court construes the terms of the Raybestos Manhattan Inc. Employee Retirement Plan in light of N.J.S.A. 34:15-29 and determine that the defendants are obligated to pay to the plaintiffs the sums due under said Plan in addition to the full amount of any Worker's Compensation Judgment entered;

C. Such other and further relief as this Court may deem just in the premises;

D. Judgment for costs of suit.

SECOND COUNT

1. Plaintiffs repeat all the allegations set forth in Paragraphs 1 through 10 of the First Count with the same force and effect as set forth at length herein.

WHEREFORE, plaintiffs demand Judgment against the defendants for all sums set off and for general and special damages, plus costs of suit and interest, jointly, severally or in the alternative.

Gelman & Gelman
Attorneys for the Plaintiffs
By Michael S. Scarola

APPENDIX 3

Notice of Removal

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 78-0434

To: MICHAEL S. SCAROLA, ESQ.
Gelman & Gelman
45 Church Street
Patterson, New Jersey 07505

SIR:

PLEASE TAKE NOTICE that no March 3rd, 1978, defendants Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc., Employee Retirement Plan, filed in the United States District Court for the District of New Jersey their Petition for Removal, accompanied by Bond on Removal in the above-entitled action from the Superior Court of New Jersey, Chancery Division, Passaic County, to the United States District Court for the District of New Jersey.

This Notice is given pursuant to the provisions of Section 1446(e) of Title 28 of the United States Code. Accompanying this Notice is a copy of the Petition and Bond so filed. Copies of the Petition have been filed with the Clerk of the Superior Court of New Jersey.

PITNEY, HARDIN & KIPP
163 Madison Avenue
Morristown, New Jersey 07960
By S. JOSEPH FORTUNATO
A Member of the Firm
Attorney for Defendants Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc., Employee Retirement Plan

Dated: March 3, 1978

APPENDIX 4

Defendants' Answer

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 78-0434

The defendants, Raybestos-Manhattan, Inc., a corporation organized and existing under the laws of the State of Connecticut and having its principal place of business at 100 Oakview Drive, Trumbull, Connecticut, and Raybestos-Manhattan, Inc., Employee Retirement Plan, by way of answer to the complaint, say:

ANSWER TO THE FIRST COUNT

1. They are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 1.

2. Answering the allegations of paragraph 2, they are without information or knowledge sufficient to form a belief as to the truth of the allegations, except that they deny that plaintiffs and those for whom the action is brought are similarly situated.

3. They deny the allegations of paragraph 3.

4. Answering the allegations of paragraph 4, they admit that the named plaintiffs are all former employees of the defendant Raybestos-Manhattan, Inc., but deny that plaintiffs and those for whom the action is brought are similarly situated.

Appendix 4

5. They deny the allegations contained in paragraph 5, except that they admit that although the named plaintiffs are contractually entitled to Retirement Income Payments from defendants, defendants are permitted under the terms of the collective bargaining agreement to offset from such payments any amounts paid in worker's compensation judgment payments.

6. They deny the allegations contained in Paragraph 6, except they admit the allegations as they apply to the named plaintiffs.

7. They deny the allegations contained in paragraph 7.

8. They deny the allegations contained in paragraph 8, since it is proper for them to follow the terms of the contract and set-off sums paid for worker's compensation judgment to named plaintiffs from retirement income payments to named plaintiffs.

9. They deny the allegations in paragraph 9, except they admit the named plaintiffs have made a demand upon them to discontinue setting-off worker's compensation judgments payments from retirement income payments and defendants have refused that demand.

10. They are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 10.

ANSWER TO THE SECOND COUNT

1. Answering the allegations of paragraph 1, they repeat paragraph 1 through 10 of their Answer to the First Count as though fully set forth at length.

Appendix 4

FIRST SEPARATE DEFENSE TO ALL COUNTS

It was proper for defendants to follow the terms of the collective bargaining agreement entered into between Raybestos-Manhattan, Inc. and the union which represented the named plaintiffs and set-off sums paid to named plaintiffs for worker's compensation judgments from retirement income payments to named plaintiffs, since N.J.S.A. 34:15-29 has been preempted by and is contrary to the provisions of 29 U.S.C. §1444 and thus unconstitutional, since the present Complaint concerns an employee pension benefit plan under the provisions of 29 U.S.C. §1081.

SECOND SEPARATE DEFENSE TO ALL COUNTS

It was proper for defendants to follow the terms of the collective bargaining agreement entered into between Raybestos-Manhattan, Inc. and the Union which represented the named plaintiffs and set-off sums to paid named plaintiffs for worker's compensation judgments from retirement income payments to named plaintiffs, since N.J.S.A. 34:15-29 infringes upon the federal interest in untrammelled collective bargaining and is thus preempted by the provisions of 29 U.S.C. §141 and §185(a) and is unconstitutional.

PITNEY, HARDIN & KIPP
Attorneys for Defendants Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc., Employee Retirement Plan
By S. JOSEPH FORTUNATO
A Member of the Firm.

Appendix 4

CERTIFICATION

We certify that a copy of the within Answer was served upon Messrs. Gelman & Gelman, attorneys for plaintiffs, at 45 Church Street, Paterson, New Jersey 07505, by certified first class mail, return receipt requested.

S. JOSEPH FORTUNATO

Dated: March 7, 1978

APPENDIX 5

Pretrial Order

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 78-0434

(Hon. Lawrence A. Whipple)

November 27, 1978
Newark, New Jersey

Before the Honorable William J. Hunt
United States Magistrate

Appearances: Jack Cohen, Esq.
Gelman and Gelman
For Plaintiffs.

S. Joseph Fortunato, Esq.
Arnold S. Cohen, Esq.
Pitney, Hardin & Kipp
For Defendants.

1. *Nature of the Action*: This action was removed from State to Federal Court pursuant to 28 U.S.C. §1441. It is an action based upon the plaintiffs' claim that defendants have and continue to improperly adhere to the terms of a collective bargaining agreement which permits the defendants to offset from retirement income payments, payments made pursuant to worker's compensation judgments. Jurisdiction in this court is based upon 28 U.S.C. §1337; 29 U.S.C. §§141; 185; 1001, *et seq.;* 1002; 1003 and 1132.

2. *Admissions and Stipulations*: Prior to trial in this matter a comprehensive stipulation demonstrating the absence

of any material facts in dispute is to be filed by counsel for both parties.

3. *Factual and Legal Contentions of Plaintiffs*: See attached.

4. *Factual and Legal Contentions of Defendants*: See attached.

5. *Claims as to Damages*: The plaintiffs demand a declaratory judgment that the setoffs by defendants are illegal and that defendants shall cease and desist from making the setoffs and that defendants pay to them the sums of the setoff, plus all general and special damages and the costs of suit and interest.

6. *Amendments*: The defendants First Separate Defense to all counts of their Answer is amended to read as follows:

> "It was proper for defendants to follow the terms of the collective bargaining agreement entered into between Raybestos-Manhattan, Inc., and the Union which represented the named plaintiffs and setoff sums paid to named plaintiffs for worker's compensation judgments from retirement income payments to named plaintiffs, since N.J.S.A. 34:15-29 has been preempted by 29 U.S.C. §1144 and is contrary to the provisions and policy of 29 U.S.C. §1001, *et seq.*, and is thus unconstitutional."

In addition, a Third Affirmative Defense to the Answer is added as follows:

> "N.J.S.A. 34:15-29 has an unfair retroactive impact on the contractual obligations of the named

plaintiffs and the defendants in violation of the Due Process Clause of the Fourteenth Amendment in the Contract Clause of the United States Constitution."

The foregoing amendments to the Answer of the defendants is upon consent of counsel for the plaintiffs.

7. *Legal Issues*: The plaintiffs state that the defendants have set off and continue to set off worker's compensation judgment payments from retirement income payments contrary to the provisions of N.J.S.A. 34:15-29.

Defendants contend that it is proper for them to follow the terms of the collective bargaining agreement and make the above-mentioned setoffs because N.J.S.A. 34:15-29 has been preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, *et seq.*, and the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. §141, *et seq.*, and is contrary to the provisions and policy of ERISA and to the policy of untrammelled collective bargaining under the LMRA, and is thus unconstitutional.

8. *Legal Issues Abandoned*: None.

9. *Additional Discovery:* None.

10. *Briefs:* Counsel shall submit trial memoranda in accordance with General Rule 27 of this Court's Rules not later than December 18, 1978.

11. *Motions:* None.

12. *Opening and Closing:* Usual order.

13. *Expert Witnesses:* None.

Appendix 5

14. *Estimated Length of Trial:* One day. Counsel for the parties at pretrial conference have advised the magistrate that a comprehensive stipulation of material facts was in preparation. Accordingly, trial of the within matter may require less than one day.

15. *Trial Counsel:*

For the Plaintiffs: Gelman and Gelman, Esqs.
For the Defendants: Pitney, Hardin & Kipp, Esqs.

16. *Trial Date:* This matter has been called for trial before the Honorable Lawrence A. Whipple on December 26, 1978, at 10:00 A.M.

WILLIAM J. HUNT
United States Magistrate

APPENDIX 6

Statement of Stipulated Facts

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 78-0434

The parties to the above captioned-matter hereby agree to stipulate to the following facts for the purposes of this litigation only:

(1) The plaintiffs in this action are all former employees of defendant, Raybestos-Manhattan, Inc. (Raybestos).

(2) The plaintiffs' dates of service are: (a) Joseph Alessi, September 14, 1939 to March 1, 1972; (b) Raymond Buisson, November 10, 1941 to January 1, 1973; (c) Stephen Michalski, June 30, 1942 to February 28, 1973; (d) Charles Pepka, June 22, 1934 to June 13, 1973; (e) Helen Vogt, August 17, 1944 to September 28, 1973; (f) T. Edward White, July 8, 1941 to June 8, 1973.

(3) With the exception of Helen Vogt, the plaintiffs are all entitled to retirement income payments from Raybestos under the terms of the Raybestos-Manhattan Inc Employee Retirement Plan (Pension Plan).

(4) Although Helen Vogt did not qualify for retirement under the terms of the Pension Plan, she is eligible to receive Deferred Termination Benefits commencing February 1, 1979.

(5) Many more former employees of Raybestos are receiving or are entitled to receive pension or deferred compensation benefits.

Appendix 6

(6) Article VI, Section (4)(b) of the Pension Plan and the Deferred Termination Benefits agreement provide in relevant part that workmen's compensation benefits are deductible from pension benefits.

(7) Under the terms of the Pension Plans a person is paid a lump sum amount at the time the workmen's compensation judgment is awarded. Thereafter, when he commences receiving pension or deferred compensation payments, a certain amount is deducted each month from these payments until the amount paid in workmen's compensation judgment is fully offset.

(8) The offset provision provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, Presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

(9) Effective July 14, 1977, N.J.S.A. 34:15-29 was amended by Chapter 156 of the Laws of 1977 to include a provision that:

> The right of compensation granted by this Chapter may not be set off against employee's retirement pension benefits or payments.

(10) Each of the plaintiffs secured a Judgment against the respondent pursuant to the New Jersey Worker's Compensation Act (N.J.S.A. 34:15-1 *et seq.*).

(11) The date and amount of the award for each respective plaintiff are: (a) Joseph Alessi, November 30, 1977, $6,470.00; (b) Raymond Buisson, October 20, 1977, $6,760.00; (c) Stephen Michalski, November 9, 1977, $4,380.00; (d) Charles Repka, August 8, 1977 $6,200.00; (e) Helen Vogt, November 21, 1977, $880.00; (f) T. Edward White, November 21, 1977, $6,170.00.

(12) Since the date of the respective worker's compensation awards, the following offsets have been made monthly by defendant: (a) Joseph Alessi ($173); (b) Raymond Buisson ($154); (c) Stephen Michalski ($170); (d) Charles Repka ($173); (e) Helen Vogt (none); (f) T. Edward White ($158).

(13) Plaintiffs' made a demand upon defendant after Chapter 156 was enacted to cease offsetting workmen's compensation judgment payments from retirement income payments.

(14) Defendant has refused to comply with the demand for the legal reasons stated in its brief.

(15) The question presented in this case is whether the deductions made subsequent to the date Chapter 156 was amended are lawful.

PITNEY, HARDIN & KIPP
Attorneys for Defendants
S. JOSEPH FORTUNATO

GELMAN and GELMAN
Attorneys for Plaintiffs
MICHAEL S. SCAROLA

APPENDIX 7

Order of the Honorable Curtis Meanor

(Filed—March 1, 1979)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 78-0434

The within matter having been brought for trial before me, the Honorable Lawrence A. Whipple, Senior Judge, U. S. D. C. and counsel for both parties having submitted a comprehensive stipulation of facts and trial briefs and having consented to the Court deciding this matter based upon said submissions; and the Court having read and considered the same and having found in favor of the plaintiffs, as is more fully and particularly set forth in the Opinion of the Court filed with the Clerk of the Court on February 15, 1979; and for good cause appearing;

It is on this 1 day of March 1979

ORDERED,

That, until the further order of this Court, the defendants, Raybestos Manhattan, Inc. and Raybestos Manhattan, Inc. Employee Retirement Plan, and its officers, agents, representatives, and servants be and are hereby permanently enjoined and restrained from making any deduction or set-off against monthly pension benefits due to the plaintiffs on account of Worker's Compensation benefits awarded to said plaintiffs, and it is further

ORDERED,

That the defendants, Raybestos Manhattan Inc., and Raybestos Manhattan Inc. Employee Retirement Plan shall

pay to each of the plaintiffs the entire amount heretofore deducted or set-off against their respective monthly pension benefits on account of Worker's Compensation benefits awarded, together with eight (8) percentum interest thereon; in accordance with the following schedule:

1. Joseph Alessi—fourteen monthly set offs of $173.00. Total deductions including interest of $2,615.76;

2. Raymond Buisson—fifteen monthly set offs of $154.00. Total deductions including interest of $2,494.80;

3. Stephen Michalski—fourteen monthly sets off of $170.00. Total deductions including interest of $2,570.40;

4. Charles Repka—seventeen monthly set offs of $173.00. Total deductions including interest of $3,176.28;

5. Edward T. White—fourteen monthly deductions of $158.00. Total deductions including interest of $2,388.96.

/s/ MEANOR
Judge, U.S.D.C.

APPENDIX 8

Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 79-1534

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

Joseph Alessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt, and T. Edward White, the plaintiff-appellees above named, present this, their petition for a rehearing in the above-entitled cause, and, in support thereof, respectfully show:

I

The Court, in its opinion of reversal herein, has failed to apply the rules and standards set forth in *Rogers* v. *Larson,* 563 F.2d 617 (3d Cir., 1977) *cert. denied,* 58 L. Ed. 2d 95 (1978) for determining federal pre-emption of state law. In so doing the Court has overlooked the importance of the preservation to the States of their historic police powers, including a State's right to ensure that injured employees are justly compensated.

II

The Court premises its opinion that the offset of Worker's Compensation benefits is not a forfeiture within the meaning of ERISA, upon an implicit approval, by

Appendix 8

Congress, of the integration of Social Security benefits with pension plan benefits. The Court reasons that because the Social Security program may encompass benefits paid both for old age and disability that Worker's Compensation benefits cannot be distinguished. The Court's conclusion misapprehends the true character of Worker's Compensation benefits.

As a consequence of the Court's failure to perceive the true character of Worker's Compensation benefits, the tests prescribed by *Batterton* v. *Francis,* 432 U.S. 416 (1977) for review of legislative regulations were not followed. Petitioner contends that regulations permitting the offset of Worker's Compensation benefits tend to defeat the purpose of the overall statutory scheme of ERISA and should be set aside.

I express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to wit, the panel's decision is contrary to the decision of this Court and the Supreme Court in *Rogers* v. *Larson, supra* and *Batterton* v. *Francis, supra.*

Moreover, this appeal involves questions of exceptional importance, to wit: given the divergence of opinion exhibited by various courts (as evidenced by this Court in footnote 10 of its Opinion) concerning the uninhibited right to otherwise vested pension benefits versus the integrity of Treasury regulations and the wide interest expressed in this case by amici curiae, the legal issues presented may be of national importance and thus worthy of the attention of the full court.

Appendix 8

Wherefore, for all the reasons set forth above as well as in our papers previously submitted and on file with this Court, it is respectfully requested that a Rehearing in Banc be granted.

GELMAN & GELMAN
Attorneys for Petitioner
45 Church Street
Paterson, N.J. 07505
By: MICHAEL S. SCAROLA

APPENDIX 9

Judgment of the United States Court of Appeals For the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1534

ALESSI, JOSEPH, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKS, HELEN VOGT and T. EDWARD WHITE

vs.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC., EMPLOYEE RETIREMENT PLAN, JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Appellants

STATE OF NEW JERSEY,

Intervenor

(D. C. Civil No. 78-0434)

No. 79-1668

Appendix 9

BUCZYNSKI, Henry, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED

vs.

THE GENERAL MOTORS CORPORATION,

Appellant

STATE OF NEW JERSEY,

Intervenor

(D. C. Civil No. 77-1644)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSENN and GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated April 3, 1979 and appealed at our No. 79-1668, and dated March 1, 1979, and appealed at our No. 79-1534, be, and the same are hereby vacated and the causes are remanded to the said District Courts for

entry of judgments for the defendants, all in accordance with the opinion of this Court. Each side shall bear its own costs.

ATTEST:

THOMAS F. QUINN
Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 27, 1980.

February 15, 1980

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX 10

Order and Judgment on Remand

(Filed—April 18, 1980)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION 78-0434

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Plaintiffs,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Defendants.

Defendants, Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan, having appealed to the United States Court of Appeals for the Third Circuit from the Order of this Court entered into this cause on March 1, 1979, and the Court of Appeals having rendered its Opinion and issued its Judgment on February 15, 1980, wherein it was ordered and adjudged that the Judgment of this Court entered in this cause on March 1, 1979 be and is vacated and that the cause be remanded to

this Court for entry of Judgment for the above defendants, with plaintiffs and defendants each bearing their own respective costs, and the Mandate on said Opinion and Judgment having been filed herein on April 1, 1980, and good cause appearing,

IT IS, on this 18th day of April, 1980,

ORDERED AND ADJUDGED, that the Order of this Court entered in this cause on March 1, 1979 be and hereby is vacated; and it is further

ORDERED AND ADJUDGED, that the Order of this Court entered in this cause on March 21, 1979 granting stay of payment of damages pending appeal and approving supersedeas bond, be and hereby is vacated; and it is further

ORDERED AND ADJUDGED, that the Order of this Court entered in this cause on May 3, 1979 granting stay of injunctive relief pending appeal, be and hereby is vacated; and it is further

ORDERED AND ADJUDGED, that Judgment in this cause be and hereby is entered for the defendants Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan, dismissing the action of the plaintiffs herein, with prejudice and without costs.

LAWRENCE A. WHIPPLE,
U.S.D.J.

We hereby consent to the form and entry of the within Order.

GELMAN & GELMAN
Attorneys for Plaintiffs
By: MICHAEL S. SCAROLA

APPENDIX 11

Statement to the Assembly, No. 1309

ASSEMBLY LABOR, INDUSTRY AND PROFESSIONS COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1309

STATE OF NEW JERSEY

Dated: May 27, 1976

The statement appended to and printed with the bill adequately explains its provisions. This legislation may have been partially prompted in response to a 1959 New Jersey Supreme Court case, *Renshaw* v. *U.S. Pipe and Foundry Co.*, wherein a retired employee brought an action in which he demanded by way of money damages, all monthly pension benefits since his employer stopped making such payments (due to contractually permitted deductions of workmen's compensation payments). The plaintiff charged that such a provision, in effect, allows the employer to recoup the amount paid the employee for compensation contrary to the only method permitted under the statute. The court declared that, in the absence of a legislative expression of public policy . . . the pension plan provision permitting such reduction of payments after retirement was not invalid.

The New Jersey AFL-CIO supported the bill and the New Jersey Manufacturers stood in opposition.

APPENDIX 12

References to Jurisdictional Statement

The following documents are relevant and material to the Court's consideration of the issues in this case and were reproduced in the Appendix of the Jurisdictional Statement filed herein at the pages noted:

Opinion of the Honorable Lawrence A. Whipple dated February 15, 1979 ..... 1a

Opinion of the United States Court of Appeals for the Third Circuit filed February 15, 1980 .. 10a

Order Denying Petition for Rehearing dated March 19, 1980 ..... 43a

Notice of Appeal 45a

Supreme Court, U. S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1943

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO DISMISS OR AFFIRM

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I. New Jersey may not regulate pension benefit composition for retirement plans covered by ERISA. 5

II. Appellants offer no basis to question the Third Circuit's holding on the substantive ERISA issue. 9

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TABLE OF CITATIONS

Cases Cited:

Alessi, et al. v. Raybestos-Manhattan, Inc., et al., No. 78-0434 (D.N.J. 1979), rev'sd, 616 F.2d 1238 (3rd Cir. 1980) 2

Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979), cert. denied, 62 L. Ed. 2d 667, 100 S. Ct. 701 (1980) 8

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Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd per curiam, 571 F. 2d 502 (9th Cir. 1978), cert. denied, 439 U.S. 831 (1978) 7

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Mishkin v. New York, 383 U.S. 502 (1966), rehearing denied, 384 U.S. 934 (1966) 2

National Carriers' Conference Comm. v. Heffernan, 454 F. Supp. 914 (D. Conn. 1978) 7

Pervel Industries, Inc. v. Connecticut Commission on Human Rights and Opportunities, 603 F. 2d 214 (2d Cir. 1979), affirming without opinion, 468 F. Supp. 490 (D. Conn. 1978), cert. denied, 62 L. Ed. 2d 667, 100 S. Ct. 701 (1980) 8

Server v. Interpace Corporation, appeal docketed No. 79-3832 (9th Cir. December 7, 1979) 11

Utility Workers Union v. Consumers Power Co., appeal docketed No. 78-1402 (6th Cir. August 2, 1978) 11

Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978) 7, 8

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Treasury Regulation 1.411(a)-4(a), 26 C.F.R. §1.411(a)-4(a) (1979) 9, 10, 11

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IRS Pub. No. 778 Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans (1972) 10

H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., reprinted in [1974] 3 U.S. Code Cong. & Admin. News 5038 7

120 Cong. Rec. S 15,737 (1974), reprinted in [1974] 3 U.S. Code Cong. & Admin. News 5177 8

APPENDIX

Appendix A — Section 514 of ERISA, 29 U.S.C. §1144 (1975) 1a

Appendix B — Section 203(a) of ERISA, 29 U.S.C. §1053(a) (1975) 3a

In The

Supreme Court of the United States

October Term, 1979

No. 79-1943

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO DISMISS OR AFFIRM

Appellees Raybestos-Manhattan, Inc. ("Raybestos") and Raybestos-Manhattan, Inc. Employee Retirement Plan ("Raybestos pension plan") respectfully move the Court pursuant to Rule 16 of the Rules of the Court to dismiss the appeal for want of probable jurisdiction or, in the alternative, to affirm the judgment below of the United States Court of Appeals for the Third Circuit on the grounds that:

1. The decision of the Third Circuit on the questions presented was carefully considered and is correct. Other than vague assertions of error, appellants offer no flaw in the Third Circuit's analysis or conclusion.

2. There is no conflict of decision among the circuit courts of appeal.

OPINION BELOW

The opinion below of the Third Circuit, included at Appendix B to the jurisdictional statement, is reported at 616 F.2d 1238.[1]

JURISDICTION

Appellants seek review of two questions. One, appellants ask the Court to consider the correctness of the Third Circuit's holding of federal preemption of a state statute. Appellants also seek review of the Third Circuit's holding that the benefit offset clause of the Raybestos pension plan is not invalid under Section 203(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1053(a) (1975).

This latter question is not appropriately before the Court on appeal, and the appeal of that question should be dismissed. *Cf., Mishkin v. New York*, 383 U.S. 502, 512-513 (1966), *rehearing denied*, 384 U.S. 934 (1966). The reasons why a writ of certiorari

1. Because the two cases presented similar questions, appellees' appeal of the district court's decision in this case [*Alessi, et al. v. Raybestos-Manhattan, Inc., et al.*, No. 78-0434 (D.N.J. 1979)], and General Motors' appeal of the district court's decision in *Buczynski v. General Motors Corp.*, 456 F. Supp. 867 (D.N.J.), *on rehearing*, 464 F. Supp. 133 (D.N.J. 1978), were consolidated by the Third Circuit for purposes of oral argument and the Third Circuit issued one opinion covering both appeals. Counsel for plaintiffs in *Buczynski* have indicated their intention to file a petition for certiorari on at least some part of the issues decided by the Third Circuit below.

should not be granted under 28 U.S.C. §1254(1) (1966), should the appeal of this latter question be considered a petition for certiorari, are hereafter set forth.

QUESTIONS PRESENTED

1. Is Chapter 156 of the New Jersey Laws of 1977 preempted by ERISA insofar as Chapter 156 prohibits employee benefit plans covered by ERISA from taking into account, or "offsetting," workers' compensation benefits in computing the plan retirement benefit?

2. Is the workers' compensation offset clause of the Raybestos pension plan invalid under Section 203(a) of ERISA, 29 U.S.C. §1053(a) (1975)?

STATUTES INVOLVED

1. Chapter 156 of the New Jersey Laws of 1977, 1977 N.J. Sess. Law Serv. at p. 455 ("Chapter 156"), amended the New Jersey Workers' Compensation Law effective July 14, 1977 and is codified at N.J.S.A. 34:15-29 (Supp. 1979). Chapter 156 provides (with the amending language in italics) that:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

2. Section 514 of ERISA, P.L. No. 93-406, 88 Stat. 897 (1974), as codified at 29 U.S.C. §1144 (1975), is set forth at Appendix A to this motion.

3. Section 203(a) of ERISA, P.L. No. 93-406, 88 Stat. 854 (1974), as codified at 29 U.S.C. §1053(a) (1975), is set forth at Appendix B to this motion.

SUPPLEMENTAL STATEMENT OF THE CASE

Raybestos maintains a pension plan which is stipulated to be an employee pension benefit plan covered by ERISA.

Appellants are former Raybestos employees eligible for retirement income payments pursuant to the benefit formula of the Raybestos pension plan. The benefit formula includes a provision, Article VI, section 4(b), which requires that all retirement income payments be reduced by the entire amount of any and all payments the member is eligible to receive under workers' compensation or similar laws (other than primary social security benefits) and which are paid concurrently with the retirement income.

Each appellant, following his or her employment with Raybestos, was found eligible for workers' compensation payments under the New Jersey Workers' Compensation Law.

Pursuant to Article VI, section 4(b) of the Raybestos pension plan, above, the monthly retirement income payment to each appellant has been and will be computed in such a manner as to take into account, or "offset," the workers' compensation award payable concurrently to each appellant.

This reduction, or "offset," is now proscribed by Chapter 156.

ARGUMENT

I.

New Jersey may not regulate pension benefit composition for retirement plans covered by ERISA.

The Third Circuit, in a unanimous opinion, correctly ruled that insofar as Chapter 156 proscribes workers' compensation offset clauses in employee pension benefit plans covered by ERISA, the state statute is preempted by ERISA.

The subject of Chapter 156 is pension plans. Chapter 156 states that employee pension benefit plans may not integrate, offset or take into account workers' compensation payments in computing plan retirement benefits. That statute provides:

> The right of [workers'] compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

The statute's effect on pension plans thus is neither collateral nor marginal, but in explicit language invalidates pension plan benefit formulae such as that of the Raybestos pension plan.

The Third Circuit concluded that:

> It simply cannot be said that this [state] statute does not concern pension plans *qua* pension plans . . ., or that its effect on such plans is merely collateral . . . . In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans . . . . (App. B to jurisdictional statement at 39a).

Appellants do not here challenge the Third Circuit's analysis of Chapter 156. Rather, appellants assert only that the Third Circuit neglected to apply established preemption principles. The federal statute involved here, however, in plain language mandates that federal law shall supersede any and all state laws relating to pension plans.

Section 514(a) of ERISA, 29 U.S.C. §1144(a) (1975), provides, with certain specifically enumerated exceptions, none of which are applicable here,[2] that state laws are superseded not only if such laws directly regulate employee benefit plans but

> insofar as they may now or hereafter *relate to* any employee benefit plan . . . . (Emphasis added.)

This broad preemptive language is expanded further by the manner in which Congress defined the terms "State law" and "State." Section 514(c), 29 U.S.C. §1144(c) (1975), provides:

> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . .
>
> (2) The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

---

2. ERISA preemption of state law is limited only by Section 514(b)(2)(A), 29 U.S.C. §1144(b)(2)(A) (1975), which permits state regulation of insurance, banking and securities; by Section 514(b)(4), 29 U.S.C. §1144(b)(4) (1975), which permits application of a state's general criminal laws; and by Section 514(d), 29 U.S.C. §1144(d) (1975), which is a savings clause for other federal statutes. Appellants do not suggest that any enumerated exception to ERISA preemption applies here.

Congress carefully chose this broad preemption language and intended preemption to be as expansive as the language of Section 514 indicates.[3]

Section 514 was drafted by the Conference Committee and is more sweeping than the preemption language contained in either the House or Senate bills, which, generally, would have limited preemption to areas or subjects expressly covered by ERISA. Congress chose, instead, to apply preemption in its broadest and most comprehensive sense. The Conference Committee Report provides:

> Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce.

H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., *reprinted in* [1974] 3 U.S. Code Cong. & Admin. News 5038, 5162.

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated as follows in presenting the Conference Committee Report:

> it should be stressed that with the narrow exceptions specified in the bill, the substantive

---

3. As the Third Circuit took note below, the legislative history of Section 514 has been exhaustively analyzed and discussed by the courts, *see, e.g., Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-917 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978), and fully supports the Third Circuit's reading of the statute.

> and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 Cong. Rec. S 15,737 (1974), *reprinted in* [1974] 3 U.S. Code Cong. & Admin. News 5177, 5188-5189.

And, acknowledging that this sweeping preemption language purposely chosen by Congress is to be given its intended effect, the First, Second, Seventh and Ninth Circuits each agree with the Third Circuit that, absent specific exception within Section 514, ERISA broadly preempts any state law which relates to employee benefit plans.[4] No circuit court of appeals states a contrary opinion.

Thus, in enacting ERISA, Congress explicitly chose to occupy the pension law field, and Chapter 156 directly intrudes into this exclusive federal pension law scheme. Chapter 156 relates to, indeed directly regulates, the benefit formulation of pension plans covered by ERISA, and the Third Circuit properly held it preempted as applied to ERISA-covered plans.

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4. *See Wadsworth v. Whaland, supra,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *Pervel Industries, Inc. v. Connecticut Commission on Human Rights and Opportunities,* 603 F.2d 214 (2d Cir. 1979), *affirming without opinion* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied,* 62 L. Ed. 2d 667, 100 S. Ct. 701 (1980); *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations,* 599 F.2d 205 (7th Cir. 1979), *cert. denied,* 62 L. Ed. 2d 667, 100 S. Ct. 701 (1980); *Hewlett-Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir. 1978) (per curiam), *cert. denied,* 439 U.S. 831 (1978).

II.

Appellants offer no basis to question the Third Circuit's holding on the substantive ERISA issue.

In its opinion, the Third Circuit carefully analyzed appellants' assertion that integration of workers' compensation benefits in computing the plan retirement benefit is invalid as a forfeiture under Section 203(a) ("Minimum vesting standards") of ERISA, 29 U.S.C. §1053(a) (1975), and unanimously concluded that this assertion was unfounded.

In so holding, the Third Circuit sustained the validity of Treasury Regulation 1.411(a)-4(a), 26 C.F.R. §1.411(a)-4(a) (1979), which expressly recognizes the permissible nature of workers' compensation offset clauses under the standards of ERISA. Treasury Regulation 1.411(a)-4(a) provides in pertinent part as follows:

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any Federal or State law and which are taken into account in determining plan benefits.

In considering the validity of this regulation, the Third Circuit examined the history of the rules of the Internal Revenue Service on workers' compensation offset clauses. It found that the Service, in its pre-ERISA revenue rulings and comprehensive guides for pension plan qualification, historically permitted workers' compensation offset clauses. The Service consistently ruled and stated that:

> The effect of section 401(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar programs, to be used for comparative purposes . . . .

> . . . .Since the benefits payable under a workmen's compensation law or occupational disease law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified plan in the instant case.

Rev. Rul. 68-243, 1968-1 C.B. 157, 158. Similarly, *see* Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 59, 72; IRS Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

Then examining the legislative history of ERISA, the Third Circuit found that Congress was aware of the Service's rules on these benefit integration practices, that Congress chose explicitly to preserve these rules in enacting ERISA, and that Treasury Regulation 1.411(a)-4(a) expressly conforms to these rules.

Appellants do not here challenge this analysis, which, as the Third Circuit found, fully supports the validity of the Treasury Regulation.

From a different approach, and constituting separate support for its holding, the Third Circuit also recognized that to give effect to appellant's Section 203(a) forfeiture claim would create impermissible conflict within ERISA. Appellants argued to the Third Circuit that because Section 203(a) lists certain exceptions to its "nonforfeitable rights" vesting standard, but does not list workers' compensation offset, this offset must be an invalid forfeiture.

However, the Third Circuit recognized that appellants' proposed construction of Section 203(a) would plainly invalidate *all* benefit integration, inasmuch as no benefit integration of any type is excepted within Section 203(a). All agree, however, that

social security and railroad retirement benefit offset[5] is permissible under ERISA notwithstanding the minimum vesting rules of Section 203(a). Accordingly, Section 203(a)'s inapplicability to plan offset of these other public, income maintenance benefits necessarily precludes any application of that statute to workers' compensation offset.

Moreover, Congress never contemplated the regulation of benefit integration practices under the minimum vesting standards of ERISA. Benefit integration and nonforfeiture have always been separate and reconcilable concepts, both prior to and under ERISA. In this regard the only regulation of benefit integration within ERISA occurs in Section 206(b) ("Form and peyment of benefits"), 29 U.S.C. §1056(b) (1975), where Congress barred only *increased* offset based on any increase in social security benefit levels following retirement or separation from employment.

There is no conflict of decision among the circuit courts of appeal on this workers' compensation offset issue. Although the validity of such offset clauses under ERISA has been appealed to both the Sixth and Ninth Circuits, *see Utility Workers Union v. Consumers Power Co., appeal docketed* No. 78-1402 (6th Cir. August 2, 1978), and *Server v. Interpace Corporation, appeal docketed* No. 79-3832 (9th Cir. December 7, 1979), to date, the Third Circuit is the only circuit court of appeals to have decided this question. It can be expected, however, that the circuit courts of appeal with similar issues pending will carefully scrutinize the decision and analysis of the Third Circuit, and apply the same thoughtful reasoning applied here in sustaining the Treasury Regulation.[6]

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5. The social security and railroad retirement programs provide benefits for disability as well as for age and survivorship. *See* 42 U.S.C. §423 (1974 & Supp. 1980), and 45 U.S.C. §231 *et seq.* (Supp. 1980).

6. The United States appeared as *amicus curiae* in the *Buczynski* proceeding before the Third Circuit below, and urged both the validity of workers' compensation offset clauses in accordance with Treasury Regulation 1.411(a)-4(a) and, in addition, ERISA preemption of Chapter 156.

CONCLUSION

For all of the reasons set forth above, appellees respectfully move the Court to dismiss the appeal, or part thereof, for want of probable jurisdiction or, in the alternative, to affirm the decision of the Third Circuit below.

Respectfully submitted,

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Dated: June 24, 1980
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APPENDIX A — SECTION 514 OF ERISA, 29 U.S.C. §1144 (1975)

Section 514 ("Other laws") of ERISA, as codified at 29 U.S.C. §1144 (1975), provides as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.
>
> (2)(a) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
>
> (B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section·

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX B — SECTION 203(a) OF ERISA, 29 U.S.C. §1053(a) (1975)

Section 203(a) ("Minimum vesting standards") of ERISA, as codified at 29 U.S.C. §1053(a) (1975), provides as follows:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.
>
> (B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Appendix B

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

Appendix B

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of

this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required

under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

FILED
DEC 20 1980
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CORRECTED COPY

No. 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees,

STATE OF NEW JERSEY,

Intervenor.

ON APPEAL FROM THE FINAL ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Appeal Docketed June 19, 1980
Probable Jurisdiction Noted November 3, 1980

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

QUESTIONS PRESENTED

I. Whether the vesting and nonforfeitability provisions of ERISA, Section 203(a), 29 U.S.C. §1053(a), prohibit offsets of worker's compensation benefits against the normal age and service benefits to which an employee is otherwise entitled.

II. Whether a state worker's compensation statute which prohibits such offsets is preempted by ERISA, Section 514(a), 29 U.S.C. §1144(a).

LIST OF PARTIES

This case was separately briefed but consolidated for oral argument and decision before the Third Circuit with *Buczynski v. General Motors*, Docket 79-1668 (3d Cir., 1980). The parties in this case are: Joseph Alessi, Raymond Buisson, Stephen Michalski, Charles Repka, and T. Edward White, plaintiffs-appellants. Helen Vogt was a party to the Third Circuit proceedings but her claim was voluntarily dismissed on July 14, 1980. Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan were defendants-appellees and the State of New Jersey intervened. The parties in *Buczynski*, with which this case has been consolidated, are Henry Buczynski and Alex Borusovic and a certified class consisting of "those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at

the time of their retirement, were employed by General Motors Corporation in New Jersey", plaintiffs-appellees. The defendant-appellant in the consolidated case is the General Motors Corporation. The State of New Jersey intervened in *Buczynski* as well. *Amici curiae* at the Third Circuit included the Grey Panthers and individual employees of several steel companies: Carmen Gargon, Frank Doumont, Robert Milanovich, Wayne Banks, Michael Barna, and Paul Miller (participants in a consolidated action with similar issues in a case now pending before the Third Circuit), supporting plaintiffs-appellees. Shenango, Inc., U.S. Steel, Crucible, Inc., Jones & Laughlin Steel, Mesta Machine Company, Pullman-Standard, Wheeling-Pittsburgh Steel, and the United States filed briefs on behalf of the defendant-appellants.

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H.R. Rept. 93-779 (Ways and Means Comm.) 26

H.R. Rept. 93-807 (Ways and Means Comm.) 8, 17, 19, 23, 32, 40, 41

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H.R. 12855 (As Introduced) 42

MISCELLANEOUS:

Bernstein, The Future of Private Pensions, (1965) 17

Halperin, Statement of Daniel R., Acting Deputy Secretary (Tax Legislation), Senate Finance Comm. Subcommittee on Labor of Senate Human Resources Committee, Subcommittee on Private Pension Plans and Employee Fringe Benefits, 95th Cong., 2d Sess. (August 15, 1978) 29

Hayes Associates, Analysis of Pension Plans/Worker's Compensation Offsets: Final Report, April 13, 1979, Contract No. J-9-P-7-0065, p. iii 20

Malone, Plant & Little, The Employment Relation, (1974) 34, 36, 37, 43

McGill, Fulfilling Pension Expectations, (1962) 17

Schiller and Weiss, Pensions and Wages: A Test for Equalizing Differences (Rev. November, 1978) 17

Weiss, "Private Pensions: The Impact of ERISA on the Growth of Retirement Funds," in Funding Pensions: Issues and Complications for Financial Markets (Fed. Reserve Bk. of Boston, Conf. Series No. 16), (1976) 17

Larsen, Worker's Compensation Law 45

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 616 F.2d 1238 and is reprinted in the Jurisdictional Statement filed herein at page 10a. The opinion of the United States District Court for the District of N.J. in this case is unpublished but is reprinted in the Jurisdictional Statement at page 1a. The district court opinion in the companion case of *Buczynski v. General Motors Corporation* is published at 456 F. Supp. 867.

JURISDICTIONAL BASIS

This appeal is from the final judgment decided and filed by the United States Court of Appeals for the Third Circuit on February 15, 1980 holding New Jersey Statutes Annotated 34:15-29 unconstitutional under the Supremacy Clause because the same is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* That decision also held that the offset of retirement pension benefits from a worker's compensation judgment is not unlawful under ERISA. (Petition for Rehearing Denied March 19, 1980).

The Supreme Court of the United States has jurisdiction to review, by direct appeal, the opinion complained of by the provisions of 28 U.S.C. §1254(2). Notice of Appeal was timely filed with the Clerk of the United States Court of Appeals for the Third Circuit on April 25, 1980, within the ninety (90) days permitted by 28 U.S.C. §2101 (c). Thereafter, Appellant's Jurisdictional Statement, Appearance and Docket Fees were filed and the appeal duly docketed on June 10, 1980. Probable jurisdiction was noted on November 3, 1980 and the appeal was consoli-

dated with *Buczynski v. The General Motors Corporation*, No. 80-193 in which the Court had granted a petition for writ of *certiorari*.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision involved is Article VI, cl. 2 of the Constitution of the United States. The statutes involved are 26 U.S.C. §401(a)(5); 29 U.S.C. §1002(19); 29 U.S.C. §1002(22); 29 U.S.C. §1053(a); 29 U.S.C. §1056(b); 29 U.S.C. §1144; 29 U.S.C. §1202(c) and N.J.S.A. 34:15-29. The regulation involved is 26 C.F.R. 1.411(a)-4(a). The rulings involved are Revenue Ruling 78-178 and Revenue Ruling 68-243. These provisions are reproduced in the appendix.

STATEMENT OF THE CASE

The plaintiffs are former employees of the defendant, Raybestos Manhattan, Inc. (JA15a, ¶ 1).[1] Each attained normal retirement age, retired and began receiving a pension under the terms of the Raybestos Manhattan Inc. Employee Retirement Plan ("the Plan") based on their long service with the Company in its asbestos manufacturing facility (JA15a, ¶3).[2] Subsequently, each of the plaintiffs obtained a New Jersey worker's compensation judgment against the Company—not the Plan or a governmental agency—for job-caused lung or other disabilities (JA16a-17a,

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1. References to the Joint Appendix will be denominated "JA. —."

2. The years of service at retirement were: Alessi, 32; Buisson, 32; Michalski, 31; Repka, 39; White, 32 (JA20, ¶2).

¶¶10, 11). The judgments were calculated on a statutory compensation schedule without reference to wage loss.

Under the language in the Plan requiring the offset of a variety of benefits,[3] the employees' pension benefits were suspended and will not resume for any plaintiff until his lost pension benefits equal the worker's compensation payments received from the Company.

All plaintiffs have lost their entire monthly pensions—Alessi and Repka, $173 each; Buisson, $154; Michalski, $170; and White, $158 (JA17a, 19a). In each case, the lost monthly benefits have been permanently and irrevocably lost because their pension entitlements will cease at death and the duration of their pension payments will not be extended by the worker's compensation award.[4]

Plaintiffs objected to this forfeiture of their normal retirement benefits, citing a provision of the New Jersey worker's compensation law specifically outlawing such practices (JA16a-17a, ¶¶9, 13).[5] Defendants nonetheless refused to revoke the suspension of benefits (JA17a, ¶14).

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3. The Plan states at Article VI, §4(b), that (JA.16a, ¶8):

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

4. It is, in fact, more likely that the plaintiffs' long term exposure to asbestos in the work environment will result in an "actuarially significant" shortening of their life expectancies.

5. "The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be offset against employee's retirement pension benefits or payments." Chapter 156 of the Laws of 1977, amending N.J.S.A. 34:15-29. None of the plaintiffs herein is receiving a disability pension.

On February 1, 1978, plaintiffs filed a class action complaint in the Superior Court of New Jersey, Chancery Division. The case was removed to the United States District Court for the District of New Jersey on March 3, 1978 (JA6a-10a). On December 28, 1978, the parties filed a Statement of Stipulated Facts (JA15a-17a). The Court, after trial on Stipulated Facts, found for plaintiffs in a Letter Opinion dated February 15, 1979, granting relief in the form of damages and an injunction barring further offsets. In so doing, the Court held that N.J.S.A. 34:15-29 was not pre-empted by ERISA, 29 U.S.C. 1144(a), and that ERISA itself made such offsets impermissible forfeitures, 29 U.S.C. 1053(a). An Order in conformity with the Court's opinion was entered on March 1, 1979 (JA18a-19a).

Defendants filed a Notice of Appeal on March 19, 1979. The Appeal was docketed on April 30, 1979 in the United States Court of Appeals for the Third Circuit. Orders granting stay of payment of damages and approving *supersedeas* bond and granting stay of injunctive relief pending Appeal were entered on March 21, 1979 and May 13, 1979, respectively.

Briefs were submitted to the Court by both parties and by the Attorney General of New Jersey, who sought and was granted permission to intervene. At the time of oral argument, on January 8, 1980, the case was consolidated with the appeal of *Buczynski v. General Motors Corporation,* 456 F. Supp. 867 (1978).

On February 15, 1980, the Court of Appeals rendered its Opinion, reversing the decisions of the District Courts in this case and in *Buczynski,* 616 F.2d 1238 (3d Cir., 1980). On February 27, 1980, the plaintiffs filed a Petition for Rehearing En Banc (JA20a). On March 19, 1980, the petition was denied and judgment was entered (JA23a).

Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Court of Appeals on April 25, 1980, together with a request to certify and transmit the entire record to the Supreme Court.[6] On November 3, 1980, the Supreme Court noted probable jurisdiction and consolidated the case with *Buczynski v. General Motors Corp.*, No. 80-193, in which the Court simultaneously granted *certiorari*.

SUMMARY OF ARGUMENT

Sections 203(a) and 3(19) of ERISA, 29 U.S.C. §1053(a) and 1002(19), prohibit the offset of worker's compensation against retirement pensions such as the offset contained in the defendant's Pension Plan. Under those sections, a Pension Plan must provide that an employee's right to his normal retirement benefits is non-forfeitable and a non-forfeitable right must be unconditional and legally enforceable against the plan. The worker's compensation offset provided in defendant's Pension Plan imposes a condition on an employee's right to normal retirement benefits which renders an employee's claim forfeitable within the meaning of Section 1002(19) of ERISA and therefore violates Section 1053(a) of ERISA.

The statutory requirements accord with Congressional policy, intended to reform the law of pensions, to assure that earned normal service pensions, as a form of deferred employee wages, are protected against a loss for any reason.

The Court of Appeals erroneously relied on a Treasury regulation, which it deemed "legislative," on certain reve-

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6. Plaintiff Helen Vogt subsequently withdrew from the case, and an order of dismissal as to her claim was entered on July 14, 1980.

nue rulings, and on an alleged analogy to the integration of Social Security benefits.

Such administrative interpretations are in fact not "legislative," essentially pre-date ERISA, misconceive the nature of worker's compensation, are largely inapposite, and violate the Act. The purported Social Security analogy is inapt, and reflects a misconception of the dissimilar nature and statutory treatment both of Social Security benefits and worker's compensation.

Finally, the New Jersey worker's compensation statute, which prohibits worker's compensation setoffs, is not preempted by ERISA, which expressly preserves state regulation of worker's compensation.

ARGUMENT

I. The provisions of the defendant's pension plan which offset a participant's normal service retirement benefits by the amount of worker's compensation he receives violate the vesting and nonforfeitability provisions of Section 203(a) and 3(19) of ERISA, 29 U.S.C. §§1053(a) and 1002(19).

A. ***The clear and unambiguous language of ERISA provides that an employee's rights to a vested retirement pension are not subject to any forfeiture or offset except those specifically delineated in Section 203(a)(3) of ERISA.***

> "With the limited exceptions noted above, *no rights, once they are required to be vested, may be lost by* the employee under any circumstances . . ." *S. Rept. 93-383* (Finance Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4890, 4934; *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4725-4726 (emphasis supplied).

Section 203(a) of ERISA plainly establishes that once a plan participant attains normal retirement age, he has *at that moment* a vested, "non-forfeitable" right to his normal retirement benefits derived from employer contributions.

Section 203(a) pertinently provides:

> "Section 203. (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is *non-forfeitable upon the attainment of normal retirement age* and in addition shall satisfy the requirements of paragraphs . . . (2) of this subsection." (Emphasis added).[7]

7. The "paragraphs (2)" reference is to an independent requirement, *Caterpillar Tractor v. Comm'r. of Internal Revenue*,

His "non-forfeitable" right is defined by Section 3(19) of the Act, 29 U.S.C. §1002(19), as follows:

> "(19) The term 'nonforfeitable' . . . means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional*, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in Section 203(a)(3)." (Emphasis supplied).

Section 203(a) and 3(19) thus establish in the clearest possible language the principle that an employee's vested pension rights cannot be forfeited or made conditional for any reason except those expressly permitted by the Section itself.[8] Such right to a "benefit . . . arising from . . . ser-

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72 T.C. No. 89, 1979 C.C.H. T.C. Reg. Dec. ¶36, 316, 260 B.N.A. Pens. Rptr. D-6 (1979), that a plan must "in addition" provide for an employee's interest in his "accrued benefit" to become nonforfeitable after he completes a period of service not in excess of those allowed under one of the three alternative vesting schedules prescribed in subsection 203(a)(2), 29 U.S.C. §1053(a)(2). The IRS can require even *shorter* periods for vesting if the plan becomes "discriminatory" in operation by favoring officers, highly compensated employees, etc. *H.R. Rept. 93-807* (Ways and Means Committee), reprinted in [1974] U.S. Code Cong. & Adm. News, at 4670, 4689. But IRS cannot allow the plan to use a longer vesting period than these statutory periods in §203(a)(2) even if the plan would not thereby be "discriminatory" in operation. This is a significant change from prior law, which did not generally require any vesting whatsoever until an employee remained in actual service to retirement age. *U.S. v. Hill*, 398 F.2d 383 (8th Cir., 1968); *H.R. Rept.* 93-807, *supra*, at 4719.

8. Section 203(a)(3) creates five "exceptions," not here pertinent, to the nonforfeitability of an employee's accrued benefits,

vice," is a deferred wage and cannot be conditioned upon fulfillment of *any* further pension plan obligation.

The provision of the Raybestos Plan for the offset of worker's compensation benefits against the normal service-based retirement benefit due these plaintiffs [9] erects such a prohibited condition to the receipt of full vested benefits by participating employees. It allows the Plan administrator, subsequent to the vesting of all benefits accrued by an employee under the Plan, and indeed after his retirement, to reduce the amount of retirement benefits it will pay him by the amount of *worker's compensation* payments the participant receives from the Company. Thus, the only way a plan participant can receive the full amount of benefits he has already independently earned under the Plan—*i.e.*, the benefits to the receipt of which he has an unconditional nonforfeitable right—is to forbear from bringing even a claim against the Company for benefits to which he is

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which relate generally to (1) the employee's death (unless a joint and survivor annuity is to be provided); (2) the employee's withdrawal of any part of his own mandatory contributions where he is less than 50 percent vested (unless the employee repays the withdrawn contributions with interest); (3) the plan's "cash out" of an employee's accrued benefit; (4) the suspension of payment of benefits attributable to employer contributions during a period in which the employee is re-employed by the same employer under the same plan; and (5) accrued benefit reductions for one plan year by plan amendment approved by the Secretary of Labor, and only to forestall substantial economic peril to the viability of the plan. (These exceptions were also added to IRC, §411, "Minimum Vesting Standards" for qualification of a trust).

9. This case does not present issues concerning the non-forfeitability of early retirement benefits or disability pensions. These involve more complex legal and actuarial analysis in order to differentiate between the forfeitable and non-forfeitable aspects or components of the total benefits payable from the plan. ERISA §§ 203(a), 206(a), 3(22); 29 U.S.C. 1053(a), 1056(a), 1002(22).

independently entitled under the New Jersey Workers Compensation Act.

Should a participating employee suffer the fortuitous event of a compensable on-the-job injury, he must face the brutal economic reality of loss of anticipated retirement benefits solely by virtue of the Plan's worker's compensation offset provisions. Not only is he denied even one additional penny to compensate him for the financial, physical, and emotional loss he endures from his disability, but instead, any worker's compensation payments he receives to *compensate* him for his loss of earnings (including his inability to earn further retirement benefits by further work with the same or another employer)[10] and earnings capacity, directly reduce the amount of money he would otherwise receive as pension benefits earned through long years of employment service to the Company and which he anticipated would be available for his financial security after retirement.

The obvious, direct and chilling result is that the employee who receives worker's compensation for a personal injury suffers a corresponding dollar-for-dollar loss in his anticipated post-retirement financial security. And if the compensatory payments are large enough, a complete forfeiture of his pension benefits is effected, as was the case with these plaintiffs, simply because they suffered bodily injury in the workplace.

The Act is clear—*no* plan provision may any longer operate to reduce a participant's benefit once vested—re-

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10. Employees do not normally receive additional pension credits after normal retirement age nor even for periods of absence from work due to compensable injury even prior to that age, 29 C.F.R. §860.120(f)(iv)(B)(3); 29 C.F.R. §2530.200b-2(a)(2)(ii).

gardless of the provision's pre-Act standing and even if it is denominated an "offset" rather than a "forfeiture", unless it is expressly permitted; once vested, *all* benefits are to be preserved.

Judicial authority to date supports these views.

In the only case to reach this Court on the interpretation of Section 203 of ERISA, the Court recognized the importance and sweeping nature of the nonforfeitability provisions of ERISA. *Nachman Corporation v. Pension Benefit Guaranty Corp.*, – U.S. –, 100 S. Ct. 1723, 64 L.Ed.2d 354 (May 12, 1980). In *Nachman*, this Court stated that *any provision* in a plan which sanctions a forfeiture of vested benefits other than those enumerated, is made illegal by ERISA. The majority observed:

> "Section 203(a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in §203(a)(2), as not subject to forfeiture. *A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date.*" 100 S. Ct. 1728, No. 10. (Emphasis supplied).

In interpreting ERISA, the majority in *Nachman* looked to the legislative history and found that it was one of Congress' central purposes to make ". . . sure that if a worker has been promised a defined pension benefit upon retirement–and if he has fulfilled whatever conditions are required to obtain a vested benefit–that he actually receive it." 100 S. Ct. at 1733.

The dissent equally noted that the definition of the term nonforfeitability precluded any "conditions subsequent" to the receipt of pension benefits. Justice Stewart referred to the comments of Representative Perkins:

> "As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definitions of 'nonforfeitable' almost identical to that contained in 29 U.S.C. §1002(19) as finally enacted: 'The definition of the term "nonforfeitable" is intended to preclude *any* conditions to receipt of vested benefits other than those noted in the definition.' II Leg. Hist. 3306 (statement of Rep. Perkins)" 100 S. Ct. at 1741, n.9 [11] (emphasis by Stewart, J.).

Thus the only expressions of opinion by this Court as to the meaning of Sections 203 and 3(19) of ERISA—albeit in the different context of nonforfeitability concepts under Title IV of ERISA—demonstrate that the language makes illegal any provision which purports to sanction a forfeiture of vested benefits by *any* reason other than those listed in Section 203(a)(3).

Such other reasons are not excused merely because they are called "suspensions" or "offsets" rather than "forfeitures." As Judge Friendly reasoned in *Riley v. M.E.B.A. Pension Trust*, 570 F.2d 406, 409 (2nd Cir., 1977), in response to a plan's claim that its suspension of benefits pursuant to an overbroad application of a re-employment suspension clause (see ERISA §203(a)(3)(B), 29 U.S.C. §1053(a)(3)(B) was not illegal:

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11. The dissent also noted that insofar as PBGC's own definition of "nonforfeitable" departs from Section 1002(19) of ERISA, it must be rejected. 100 S. Ct. 1739, n. 5.

"When § 203(a)(3)(B) provides that certain kinds of suspensions [of pension benefits] are not forfeitures, it necessarily implies that those not falling within its terms are. . . . If the language of the statute left any doubt that Riley is entitled to prevail unless the conditions of §203(a)(3)(B)(ii) have been met, this would be removed by the portions of the Conference Report quoted in the margins.°

° *Permitted forfeitures of vested rights.*

Under the conference substitute, except as outlined below, an employee's rights, once vested, are not to be forfeitable for any reason. An employee's rights to benefits attributable to his own contributions may never be forfeited.

° ° °

House Conference Report No. 93-1280, 93d Cong., 2d Sess. 1974, reproduced in 3 [1974] U.S. Code Cong. & Ad. News 5038, 5052-53."

The Court in *Riley* further observed that the language of ERISA required an expansive reading of the term "nonforfeitable" since it was specifically and broadly defined in Section 3(19) of ERISA, 29 U.S.C. §1002(19). The Court ruled that:

"As regards employer contributions, the employee's rights must be nonforfeitable if he has met certain requirements relating to age and years of service which Riley concededly has done. Section 3(19), 29 U.S.C. §1002(19), defines 'nonforfeitable' as meaning, among other things, a claim 'which is unconditional and which is legally enforceable against the plan.' *The provision* of Article II A, §13, quoted above, fn. 2, *places a condition on Riley's claim to the*

monthly benefits to which he otherwise would be entitled and makes his claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA." (emphasis added) *Id.* at 409.

On like reasoning, formerly acceptable "bad boy" clauses have been disapproved. *Winer v. Edison Brothers Stores Pension Plan,* 593 F.2d 307 (8th Cir., 1979); *Amory v. Boyden Associates,* 434 F. Supp. 671 (S.D.N.Y. 1976); *Lewis v. Merrill Lynch, Pierce, Fenner and Smith,* 431 F. Supp. 271 (E.D. Pa., 1977) notwithstanding approval of such clauses by the IRS in a pre-ERISA ruling, see Revenue Ruling 71-92, IRB 71-7 ("misconduct" forfeiture provision does not render plan discriminatory even though "misconduct" not defined so long as evenly applied).

The same rationale invalidates the worker's compensation offset in this case, again, notwithstanding supposed prior IRS approval. As explained by Judge Pratt in *Utility Workers v. Consumers Power,* 453 F. Supp. 447, 456 (E.D. Mich., 1978), appeal pending, No. 78-1402 (6th Cir.), in the course of reversing his own prior decision in *Carlson v. Bundy Manufacturing Corporation,* Civ. No. 6-72274 (E.D. Mich., 1977), approving such offsets:

"As previously indicated, Congress has set forth a broad rule of non-forfeitability and then provided certain limited exceptions to it. In *Riley* and *Keller* [v. *Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (ND Ohio, 1976)] this Congressional language has been construed in favor of workers. The Court is persuaded that Congress did not intend to exempt workmen's compensation payments from the non-forfeitability requirement of ERISA. Just as in the *Riley* case, the workmen's compensation offset pro-

vision of this pension plan places a condition on the plaintiff's claim to monthly benefits which makes that claim legally unenforceable against the plan. It therefore constitutes a forfeiture as that term is used in ERISA. The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language."

Accord: Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wisc., 1980), appeal pending, No. 80-1755 (7th Cir.).

A separate series of decisions in District Courts all within the Third Circuit had also invalidated worker's compensation offsets against normal pension benefits before the decision below. See, *Carpenter Technology Corporation v. Boyton,* Opinion of December 12, 1979 (Jurisdictional Statement, Appx. G) modified, March 7, 1980 Civ. No. 78-1415, (D. N.J.), and the lower court decisions in the consolidated cases herein, *Buczynski v. General Motors,* 456 F. Supp. 867 (D. N.J. 1978) *recons. den.,* 464 F. Supp. 133 (D. N.J. 1978); *Alessi v. Raybestos-Manhattan,* Civ. No. 78-0434 (D. N.J. 1979).

Each of the plaintiffs will under defendant's argument and the ruling below thus suffer a total and irreversible loss of the monthly benefits he would otherwise receive simply because he contracted an illness or injury at the workplace and used his statutory remedy to worker's compensation. The language of ERISA plainly prohibits that result.[12]

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12. The complete forfeiture of benefits on these facts highlights the error in the attempts of defendants (in the papers opposing review by this Court) to use this Court's language in *Nachman Corporation v. Pension Benefit Guaranty Corporation,*

B. *The purposes and legislative history of ERISA confirm the plain language of the act that an employee's deferred wages represented by his pension benefits are protected from loss under a Worker's Compensation offset provision.*

ERISA's policies are based on the premise, grounded in modern economic fact, "that promised pension benefits are in the form of a . . . deferred wage," *H.R. Rept.* 93-533 (Education and Labor Comm.), reprinted in [1974]

— U.S. —, 100 S. Ct. 1723, 64 L.Ed.2d 354 (1980), out of context to carry out their theme that so-called "integration" of any sort or benefit is acceptable notwithstanding ERISA. Accepting the proposition that the term "forfeiture" ". . . normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights . . .," *Nachman Corporation v. Pension Benefit Guaranty Corporation, supra,* 100 S. Ct. at 1732, it is nonetheless apparent that the plaintiffs have in fact suffered a complete and irrevocable loss of their pension benefits because of a single event—a claim for worker's compensation upon discovery of a work-related disability. Defendants cite the Court's language suggesting that "nonforfeitability" describes ". . . the quality of the participant's right to a pension rather than a limit on the amount he might collect." *Id.* In the plan termination context of *Nachman*, this language plainly refers to the contrast between the necessarily unconditional claim against the legally separate pension trust, ERISA §§402, 502(d)(2), 29 U.S.C. 1102, 1132(d)(2), and the entirely different pension contract arising against the employer directly for the full amount of a promised pension but for clauses limiting the employer's liability such as were involved in *Nachman*. See, e.g., *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 182 n. 20 (1971); *Hoefel v. Atlas Tack Corporation*, 581 F.2d 1 (1st Cir., 1978), *cert den sub nom, Atlas Tack v. Mahoney*, 440 U.S. 913 (1979); *Matter of Erie Lackawanna Ry Co.*, 548 F.2d 621 (6th Cir. 1977), *Rochester Corporation v. Rochester*, 450 F.2d 118 (4th Cir., 1971); *Hurd v. Illinois Bell Telephone Company*, 234 F.2d 942 (7th Cir., 1956); *Stopford v. Boonton Molding Co.*, 56 N.J. 169, 265 A.2d 657 (1970); *Schlosser v. Allis-Chalmers*, 86 Wisc. 2d 226, 271 N.W.2d 879 (1978).

U.S. Code Cong. & Adm. News at 4639, 4651,[13] and that the pension trust which provides such benefits is effectively the property of employees rather than the employer[14]—

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13. The deferred wage analysis and its history is a consistent theme in ERISA's legislative history. As the Senate Labor Committee noted:

> ". . . [D]uring World War II and the Korean conflict, . . . [i]ncreases in fringe and retirement benefits . . . became a means of compensating workers in lieu of increased wages, thus making pensions a form of deferred wages."

S. Rept. 93-127 (Labor and Public Welfare Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4838, 4839. See also: *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4640 (describing pensions as the "deferred component of compensation"); *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4714 (acknowledging that employees must often elect between "current compensation or some other form of [current] benefits to coverage under a pension plan"). And see *Inland Steel v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. den.* 336 U.S. 960 (1949).

14. The economic analysis of the operation of a pension trust underlying the Congressional premise is simple. The employee defers a modest portion of wages directly to a joint pension trust which is (at least theoretically) capable of earning far more in investment return over his worklife than an individual's bank account would. For the employer's part, he ends up effectively borrowing from the current wages otherwise due an employee in exchange for a promise to pay both the deferred wages and interest in the distant future, in the expectation that investment growth in the pension trust in the interim will fund much of that promise. Weiss, "Private Pensions: The Impact of ERISA on the Growth of Retirement Funds," in *Funding Pensions: Issues and Complications for Financial Markets* (Fed. Reserve Bk. of Boston, Conf. Series No. 16), pp. 141-144 (1976). Support for the deferred wage concept of pensions can also be garnered from numerous other sources. Bernstein, *The Future of Private Pensions*, 118-121 (1965); McGill, *Fulfilling Pension Expectations*, 164-165 (1962). A recent paper by Schiller and Weiss (of American University and Joint Committee on Taxation, U.S. Congress), *Pensions and Wages: A Test For Equalizing Differences* (Rev. November, 1978, funded by the U.S. Administration on Aging and the U.S. Dept. of Labor and University of Maryland's Computer Science Center), empirically confirms the authors' hypothesis that, "More generous

a policy conclusion evidenced by the very title of the statute: the *Employee* Retirement Income Security Act.

It was Congressional concern that prevailing legal concepts were significantly out of touch with reality both as to the nature and the content of the promises made to employees, which sparked the massive reform in ERISA. The Act is designed to conform the law to economic reality in order to "assure that workers now covered by pension plans get their expected benefits." *H.R. Rept. 93-533* (Education and Labor Comm.), Supplemental Views of Reps. Quie, Ashbrook, Erlenborn, Eshleman and Hansen, reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4666.

The result was a broad remedial statute in the classic sense, entitled to a liberal interpretation to accomplish its purposes. In the words of the Senate itself, "[i]t is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs." S. *Rept. 93-127* (Labor and Public Welfare Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News, at 4838, 4854.

The issue, as both the House Education and Labor Committee and the Senate Labor and Public Welfare Committee viewed it, was "whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits they have earned as deferred compensation and which have been placed for them in a fund for retirement purposes." S. *Rept. 93-127* (Labor and Public Welfare Comm.), reprinted in [1974] U.S. Code

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pension provisions are offset by lower wage rates, i.e., that equalizing differences operate across the different dimensions of total compensation." (Abstract). In effect, say the authors, "workers pay for their own pensions by accepting lower wages." (Id., 1).

Cong. & Adm. News at 4838, 4845; see also *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4644-4645. Congressional analysis focused on two crucial aspects of actual perceptions in modern life which seemed to be largely unrecognized in the common law. The first was the content of the employee's perception of the promise made to him. The second was the deferred wage concept itself. Congress was concerned that the widening gulf between law and reality was undermining employee confidence in the private pension system as a means of saving for old age so as to undermine one of the principal sources of saving and investment capital to fuel the economy's growth.[15]

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15. Congress estimated the size of private pension fund assets at $150,000,000,000 in 1973 with anticipated growth to $225,000,000,000 by 1980. *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4641; *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News, at 4670, 4672. Employee savings represented by both total funded *and* unfunded vested liabilities are substantially above these amounts.

Senator Bentsen of Texas, a major supporter of ERISA and a businessman of long experience, drew direct analogy in floor debate between the function of ERISA's plan termination insurance provisions and other programs for maintaining confidence in savings and investment vehicles, such as the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. U.S. Senate Proceedings, August 22, 1974, reprinted from the Congressional Record, in III Legislative History of the Employee Retirement Income Security Act, at 4794-4795.

These massive amounts contrast markedly with the relatively minor national aggregate of worker's compensation offsets and offer a ready explanation as to why Congress did not feel the need to deal with such offsets expressly. The total financial impact on *every* pension plan in the country of outlawing such offsets was recently analyzed in a report prepared for the Department of Labor as follows:

(1) The estimated number of affected pension plans is 7,200 or 8.5% of defined benefit plans.

Senator Javits, probably ERISA's chief mentor, stated the nature of the practical problems in forceful terms on the floor:

> "The fact of the matter is that the private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary and when he does not get it or some reasonable portion of it, he is angry, frustrated, and ultimately convinced that he has been robbed of a material recognition that was due him."

U.S. Senate Proceedings, September 18, 1973, reprinted from the Congressional Record, in II Legislative History of Employee Retirement Income Security Act, at 1579, 1609.

One source of pension benefit losses which contributed to the perception (no matter how technically correct) by

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(2) The estimated number of affected claimants is 2,000 per annum or 0.006% of the 32,237,000 participants in defined benefit plans.

(3) The estimated average benefits to affected participants would be approximately $225 per month under plans with immediate benefit provisions, and about $340 per month under plans with deferred benefits which permit benefit accrual while disabled.

(4) The estimated increase in annual pension plan contributions ranges from $31,700,000 to $34,100,000 or only 0.22% to 0.24% of current pension costs.

Hayes Associates, Analysis of Pension Plans/Worker's Compensation Offsets: Final Report, April 13, 1979, Contract No. J-9-P-7-0065, p. iii. The analysis was prepared in connection with a pending legislative proposal to outlaw in absolutely explicit terms *all* worker's compensation offsets against any type of pension benefit.

employees that they were, in Senator Javits' words, being "robbed," was the application of technical limitations or conditions buried in a pension trust document and incomprehensible to (and, at times, actually even hidden from)[16] the average employee, who had perceived the promise made to him solely in terms of expansive statements made in employer benefit brochures or in union meetings or similarly, about marvelous pension benefits.[17] As both labor committees of Congress observed:

> "In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording . . . ."

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16. Congress expressly noted that "owing to the lack of employee information" regarding employee benefit plans "it is therefore desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made. . . ." ERISA, §2(a), 29 U.S.C. 1001(a). Congress addressed both the problems of concealed documents and the overly glowing nature of company benefit brochures by enacting the reporting and disclosure requirements of Title I, Subtitle B, Part I of ERISA, 29 U.S.C. 1021, *et seq.* As a historic side-note, it may be observed that at least one court had begun to deal with this same problem by refusing to consider undisclosed plan terms as part of the employee's "contract" with the employer, *Chapin v. Fairchild Camera & Instrument*, 31 Cal. App. 3d 192, 107 Cal. Rptr. 111, 114 and n.6 (1973).

17. The retiree, subjected to the offsets involved in these cases, of course only discovers these technical terms after his retirement and after his departure from the workplace and collective bargaining unit. Cf. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

S. Rept. 93-127 (Labor and Public Welfare Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 4838, 4841-4842. See further 4865. *H.R. Rept. 93-533* (Education and Labor Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4643. See further 4650. As the Senate Labor Committee stated, the issue was "whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives," *S. Rept. 93-127* (Labor and Public Welfare Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 4838.

The result was ERISA's nonforfeitability requirements, to emphasize that the pension was earned by the employee's service and rightfully belonged to him on that basis alone, without further conditions or obligation to his employer or anyone else.

Congress thus declared it to be the public policy of the United States to improve "the equitable character of such [employee benefit] plans by requiring them to vest the accrued benefits of employees with significant periods of service . . ." ERISA §2(c), 29 U.S.C. §1001(c). To remedy the fact, found by Congress in §2(a), 29 U.S.C. §1001(a), that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting in such plans," Congress ordained in Section 203(a) that each pension plan provide that an employee's right to his normal retirement benefit vest upon attainment of normal retirement age and in addition satisfy one of the three minimum vesting schedules under which the rights to an accrued benefit become nonforfeitable at once after a certain period of service or after a period of service and attainment of a certain age.

Congress, in drafting this general rule of vesting and nonforfeitability plainly, intended to prohibit *any* provi-

sion which reduced the amount of pension benefits a worker expected to have upon his retirement.

The House Ways and Means Committee and Senate Finance Committee reported that ERISA was designed in part "to make sure . . . that those who do participate in such plans . . . do not lose their benefits as a result of unduly restrictive forfeiture provisions . . . ," *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4671; *S. Rept. 93-383* (Finance Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4890, 4898. And the House Labor Committee expressed its "[c]oncern for loss of benefits by workers after long years of labor through circumstances beyond their control." *H.R. Rept. 93-533* (Education and Labor Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4643.

A plan provision causing the loss of pension benefits already earned through long years of service simply because the employee is injured or maimed on the job is plainly an example of precisely the type of circumstance "beyond a worker's control" which causes him to feel "robbed" and which Congress intended to prohibit.

C. *The conclusions reached below are erroneous*

The Court of Appeals accepted defendants' arguments attempting to justify the worker's compensation offset notwithstanding the clear and unequivocal language, history and purpose of Section 203(a) and 3(19) of ERISA, 29 U.S.C. 1053(a) and 1002(19). In the final analysis, defendants and intervening defendant rely on semantic distinctions, tautological analyses, the pre-ERISA status quo and their own self-serving regulations to justify abuses

forbidden by ERISA and which Congress intended to eliminate.

The court seemingly based its decision on conclusions that: (1) the supposedly dispositive regulation was "legislative" rather than "interpretive" in character; (2) the regulation and a pre-ERISA ruling formally and rationally allowed unlimited offsets of worker's compensation benefits against normal service-related pension benefits, and/or (3) at least, that the regulation was not sufficiently contrary to law or arbitrary to be invalidated notwithstanding its supposed "legislative" status because the conceded legality of offsets of Social Security old-age benefits indicated that "it cannot be true that all reductions in benefits are necessarily forfeitures", *Buczynski v. General Motors, supra,* 616 F.2d at 1246. The court never reached the point of affirmatively explaining why worker's compensation offsets against normal retirement benefits are or should be permitted by the statute.

1. The Treasury Regulation is not "legislative" in character.

The Third Circuit began its analysis by concluding that the worker's compensation offset was "expressly authorized" by Treasury Regulation Section 1.411(a)-4(a); that that Regulation, like *all* the Treasury regulations under ERISA, or virtually every regulation on pensions was "legislative" not "interpretative" in character by virtue of ERISA Section 3002(c), 29 U.S.C. 1202(c),[18] and, there-

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18. The section provides:

(c) Regulations proscribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards

fore, virtually immune from judicial review and that accordingly, to sustain the Regulation, " 'We need only determine . . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole.' " [19] Indeed, the judicial opportunity for review is so limited, said the Court, that "a legislative regulation [may] be invalidated only for a clear and manifest conflict with the governing statute," *Buczynski v. General Motors, supra,* 616 F.2d at 1243, a conflict "*so* contrary to ERISA that it cannot stand." *Id.,* 616 F.2d at 1247 (emphasis added).

Little wonder, then, that the Third Circuit reached the conclusion that it did, having given almost conclusive deference to the Treasury Regulation—despite the facts, discussed below, that this new "regulation" does *not* "expressly authorize" a worker's compensation offset and that it violates the anti-forfeitability provisions of the statute, ERISA Section 203(a), 29 U.S.C. 1053(a) (1974), and that assertions to the contrary have no valid basis in I.R.S. regulations and rulings.

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set forth in parts 2 and 3 of subtitle B of subchapter 1 of this chapter which include 29 USC §1053(a). Except as otherwise provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

Portions of §411 of the Tax Code, 26 U.S.C. §411, within the jurisdiction of the IRS are, in fact, complete parallels of ERISA, §203, 29 U.S.C. §1053 within the jurisdiction of the Department of Labor.

19. Judge Garth relied on the conclusion in his prior opinion in *Baker v. Otis Elevator,* 609 F.2d 686 (3d Cir. 1979), for the "legislative" regulation analysis. *Buczynski v. General Motors,* 616 F.2d 1238, 1242 (3d Cir. 1980).

Treasury Regulation Section 1.411(a)-4(a) is in fact not a "legislative" regulation at all. Certainly it cannot take on that character, as distinguished from a conventional "interpretative" regulation, merely by reliance on Section 3002(c) of ERISA, 29 U.S.C. 1202(c).

Section 3002(c) of ERISA, 29 U.S.C. 1202(c), on which the Third Circuit relied, simply makes certain interpretative regulations of Treasury binding on the Secretary of Labor. It in no way purports to delegate "legislative" power to Treasury, especially since Congress has itself specifically defined the term "nonforfeitable" in ERISA Section 3(19), 29 U.S.C. 1002(19). Much less does it purport to permit only token judicial review of Treasury regulations, the effect which the Third Circuit ascribed to the Regulation in abdication of the Court's own responsibilities.[20]

29 U.S.C. 1202(c) was simply intended to allocate administrative responsibilities between the Labor and Treasury Departments as to matters otherwise within their concurrent jurisdiction, obviously to avoid duplicate and possibly inconsistent regulation. Section 1202(c) was not designed to give the Treasury power to modify Congressional definitions of "nonforfeitability" in Section 203 and

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20. That conclusion, of limited judicial review, is particularly ironic in that in ERISA Congress for the first time provided an effective avenue for judicial review of IRS determinations on matters relating to a plan's qualification, both for employees (who previously had no remedy whatsoever) and employers (who had only a burdensome method of seeking review), Internal Revenue Code §7476, 26 U.S.C. §7476; *H.R. Rept. 93-779* (Ways and Means Comm.), reprinted in II Legislative History of the Employee Retirement Income Security Act, at 2584, 2693-2695. It strains credulity to believe that Congress intended simultaneously to offer effective judicial review of IRS determinations with the right hand of §7476 of the Tax Code while withdrawing it with the left hand of §3002(c) of ERISA.

3(19) of ERISA, or to preclude meaningful judicial review.

In ERISA, Congress *did* specifically authorize certain legislative regulations, *all of which are superfluous if the lower court is correct as to the effect of §1202(c).* Compare 29 U.S.C. §1002(27) (respecting "present value"); 29 U.S.C. §1002(28) ("normal service cost" and "normal cost"); 29 U.S.C. §1002(29) ("accrued liability"); 29 U.S.C. §1002(30) ("unfunded accrued liability"); and 29 U.S.C. §1002(31) ("advanced funding, actuarial cost method"). Indeed, Congress expressly authorized certain legislative regulations in the same section of ERISA, 203, subsection (a)(3)(B), by expressly authorizing the Secretary of Labor to "prescribe such regulations as may be necessary to carry out the purpose of this subchapter, including regulations with respect to the meaning of the term 'employment.'" Cf. *Batterton v. Francis,* 432 U.S. 416, 419 (1977) (authority to define "unemployment"). These specific authorizations are in marked contrast to Section 3(19), 29 U.S.C. §1002(19), defining "nonforfeitability" clearly and completely.

It is inconceivable that Congress would have created the rule of nonforfeiture and at the same time have left it to the Internal Revenue Service to determine what offsets or reductions would be permissible. One need only look at the legislative history and purpose of ERISA to realize the absurdity of such a contention.

The Third Circuit has simply fallen prey to the attempts of the IRS[21] to bootstrap its authority by the

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21. We doubt that appellees would be as willing in other matters expediently to accord the IRS the invulnerability to judicial review which it seeks in this matter. It is, after all, employers who do the bulk of battle with the IRS on pension matters.

commingling of "legislative" and "interpretative" regulations in its publications, see, *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir., 1974); *American President Lines v. Federal Maritime Comm'n.*, 316 F.2d 419, 422 n.5 (D.C. Cir., 1963) (per Burger, J.). The intent of §3002(c) was simply to accord primacy to the IRS over the Department of Labor in certain initial interpretations of a statute over which both possessed enforcement responsibility and implicit interpretative power, see *American President Lines v. Federal Maritime Comm'n., supra*, 316 F.2d at 422 n.5. A further intent to give the IRS primary authority over the *courts* in interpreting the statute can*not* be found in the provision.

2. In any event, Treasury's administrative interpretations are contrary to law and provide no rational basis for concluding that offsets of Worker's Compensation for personal injury against an employee's normal age and service retirement benefits is a permissible form of "integrating" and "correlating" retirement benefits.

In any event, the distinction between "legislative" and "interpretative" regulations is irrelevant. As noted in both of Judge Garth's decisions, *Baker v. Otis Elevator*, 609 F.2d 686 (3d Cir., 1979) and the decision herein, a legislative regulation may be invalidated for "a clear and manifest conflict with the governing statute." 616 F.2d at 1243. The supposed administrative approval of worker's compensation offsets plainly falls into that category.

Defendants' analysis is essentially as follows: In 1942, 32 years prior to ERISA, Congress enacted Section 401(a)(5) of the Internal Revenue Code. Section 401(a)(5) provides:

> ". . . Neither shall a plan be considered discriminatory . . . merely because the contributions or benefits . . . differ because of any *retirement* benefits created under State or Federal law." (Emphasis supplied).

Then, in 1968, 26 years after Congress created the language set forth above and 6 years prior to the enactment of ERISA, a lawyer for the agency issued "his opinion" in the form of a revenue ruling, not a regulation, that the words "retirement benefits created under State or Federal law" included worker's compensation benefits. Revenue Ruling 68-243, I.R.B. 1968-21. The opinion was wrong from the outset; was issued without any possible attention to ERISA's non-forfeitability requirements and was invulnerable to judicial review until ERISA. Defendants nonetheless assert that later boilerplate references to the pre-ERISA ruling combined with a Treasury "regulation" have successfully amended the statute to add the anti-discrimination exception of Section 401(a)(5) to the Congressionally mandated definition of non-forfeitability.

The decision of the Third Circuit below accepting these claims violated the settled principle that "[t]he deference owed to an [administrative agency] cannot be allowed to slip into a judicial inertia." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Treasury's own recent admission of its ". . . limited knowledge of worker's compensation,"[23] confirms the fact, evident from the rulings themselves, that Treasury simply was not aware of the issues with respect to worker's compensation offsets.

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23. Statement of Daniel R. Halperin, Acting Deputy Assistant Secretary (Tax Legislation), Senate Finance Comm., Subcommittee on Labor of the Senate Human Resources Committee Subcommittee on Private Pension Plans and Employee Fringe Benefits, 95th Cong., 2d Sess. (August 15, 1978).

The plain fact is that Treasury's apparent practice and present assertions that worker's compensation offsets against normal retirement benefits are permissible simply cannot be accepted because: (1) the practice is not even supported by the agency's formal published rulings; (2) Treasury has no basis for amending the statute to add the anti-discrimination exceptions in 401(a)(5) for "integration" of retirement benefits under State or Federal law to Congress' list of exceptions to the mandatory minimum nonforfeitability standards separately expressed in ERISA §203 and §411 of the Tax Code; and (3) Treasury's further conclusion that worker's compensation benefits are "retirement" benefits is simply not a rational nor a reasoned conclusion.

The most striking flaw in the continuing assertions of reliance on a complex constellation of regulations and rulings cited by the defendants in these cases is that—despite its admitted lack of understanding of worker's compensation programs—Treasury has never once stated in a published ruling or regulation that worker's compensation benefits can be offset against normal age and service retirement benefits. The supposedly dispositive and "legislative" Regulation 1.411(a)-4(a) speaks only of retirement "... benefits which are provided under the Social Security Act or under any other Federal or State law . . .",[24] and never says a word about worker's compensation. Revenue Ruling 68-243, *supra*, does talk about worker's compensation offsets but it is completely silent as to the type of pension plan benefits they can be offset against. Revenue Rul-

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24. The word "retirement" found in §401(a)(5) of the I.R.C. upon which Treasury assertedly based its regulation, was omitted from the text of the Regulation but both the government and appellees admit that this crucial word must be considered a part of the Regulation. The implications of the omission are addressed later.

ing 78-178, I.R.B. 1978-20, pp. 9-10, only incidentally recites Revenue Ruling 68-243 to distinguish it away by suggesting that worker's compensation is analogous to a "disability" pension and thus might be used to establish an "integrated and correlated retirement system" under applicable regulations (namely Treasury Regulation 1.401-4 (b)). The most natural reading of the actual rulings is simply that offsets of worker's compensation benefits against *disability* pensions are permissible because of their common "correlated" origin in a worker's physical injury or disease.[25] Any contention that the rulings reach farther to allow offsets against a *normal* pension is patently contrary, under Treasury's own analogies, to the Congressional mandate in 3(22) of ERISA, 29 U.S.C. 1002(22) that "the normal retirement benefit shall be determined without regard to . . . (B) disability benefits. . ."

The second premise of the argument for deference to the administrative interpretations assumes that Treasury has the power to amend the statute by adding the anti-discrimination exceptions of Code §401(a)(5) as an unlimited and unrestricted addition to the narrow list of non-forfeitability exceptions prescribed by Congress in ERISA §203/IRC §411. The statute does not provide any justification for this wholesale addition to the statute. If Treasury thinks Congress has made a mistake, it can seek a legislative amendment to correct the situation. It cannot amend the statute by regulation to implement its view of proper policy, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936); *General Electric v. Burton*, 372 F.2d 108, 111 (6th Cir. 1967). Treasury's errors on both a theoretical and mechanical level indicate that there is no basis for judicial deference to its supposed "reasoning."

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25. The same seems to us to be the more proper interpretation of rulings on "integration" of social security "disability" benefits as well.

The obvious theoretical mistake is that Treasury fails to understand that the relationship between the anti-discrimination requirements of §401 of the Code and the vesting requirements of ERISA §203/IRC §411 is not a two-way street. Section 203 imposes mandatory minimum standards for all pension plans on a general basis regardless of the factual circumstances of a plan. Section 401 gives the IRS authority to impose even *more stringent* standards on a case-by-case basis, *H.R. Rept. 93-807* (Ways and Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4730. It does not give Treasury the power to waive the minimum standards of §203 on either a general or a case-by-case basis.[26]

The other obvious error, the omission of the critical word "retirement" in the regulation, is the understandable product of a mind-set which considers pensions a simple pay-off to placate the older worker for his lost wages when he is removed from the workplace. From that viewpoint, there is no difference between retirement benefits and other collateral sources which allow the nation's elderly to pay for their food, clothing, and shelter, so that "integration" of any of these sources of income is proper. Several of the defendants in these cases share this viewpoint. Congress does not. Congress has taken the quite different position that pensions represent deferred wages which should not be affected by payments attributed to events or losses after the wages have been earned by the completion of age or service requirements. A "regulation" issued without apparent reasoned consideration of this important policy and its implications is void. *Permian Basin Area Rate*

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26. The statute does give the Department of Labor power to waive the requirements of §203 in certain circumstances, ERISA §§203(a)(3)(C), 302(c)(8), 29 U.S.C. 1053(a)(3)(C), 1082(c)(8). This negates an implied power of waiver on the part of Treasury.

Cases, 390 U.S. 747, 792 (1968); *Greater Boston Television Corporation v. Federal Trade Comm'n*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971).

The final item militating against deference to the administrative interpretations is that Treasury has ignored not only the controlling Congressional philosophy of pensions—but also the controlling philosophy of Congress and the state legislatures which considers worker's compensation not a simple welfare benefit to cover lost wages, but instead, a direct replacement for common law tort damages to compensate for personal injury and its consequences with payments for loss of bodily members and medical benefits as well as lost future earnings *capacity* (a concept to be carefully distinguished from actual wage-loss).[27] Treasury simply does not have the authority to ignore the binding determinations of Congress and the states as to the nature, operation, and effect of worker's compensation, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936); *Biddle v. Comm'r of Internal Revenue*, 302 U.S. 573, 582 (1937); *O'Neill v. United States*, 410 F.2d 888 (6th Cir. 1969). The evidence that it has nonetheless done so is apparent from the very face of the Treasury's published rulings.

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27. Congressional acceptance of the general proposition that worker's compensation is analogous to personal injury damages rather than retirement pensions is evident in the Tax Code itself. Sections 103 and 104 of the Code, 26 U.S.C. 103, 104 recognize the analogy in entirely exempting both personal injury damages and worker's compensation from income tax. Retirement income, by contrast, is fully taxable under Code §61(a)(11), 26 U.S.C. 61(a)(11), to the extent not previously taxed in the year contributions were made. The IRS has recognized that these sections reflect a crucial distinction between worker's compensation and normal age and service retirement benefits, I.R.C. Regulation 1.104-1(b), 26 C.F.R. 1.104-1(b); Revenue Ruling 80-14, I.R.B. 1980-2, p. 12 (January 14, 1980); Revenue Ruling 80-44, I.R.B. 1980-8, p. 6 (February 25, 1980).

The evidence begins in Revenue Ruling 68-243 itself. It gave the green light to worker's compensation offsets but simultaneously *dis*allowed offsets of common law tort damages on the ground that an offset of tort damages would allow the employer to pay his own liabilities out of the assets of the pension fund. The only possible explanation for this result (other than complete irrationality) is a lack of awareness that in virtually every state worker's compensation payments are the comprehensive replacement for tort damages and remain a liability of the employer. To put it simply, the force of Rev. Rul. 68-243 "as an aid to the interpretation of the statute is impaired by [this] internal inconsistency," *United States v. Calamaro*, 354 U.S. 351, 359, n.12 (1957), which belies any contention that Treasury engaged in some thorough and comprehensive review of worker's compensation programs to reach a reasoned conclusion allowing worker's compensation offsets.[28]

Treasury's lack of awareness of worker's compensation principles was not its only fault in Revenue Ruling 68-243. It also failed to address the statutory issue under the Tax Code as to the status of worker's compensation benefits as

28. It is possible that the Treasury lawyer rendered his opinion on the sole basis of representations concerning a worker's compensation program in one of the six (6) states which maintain an exclusive and mandatory state insurance fund of worker's compensation benefits and that he confused such a program with governmental insurance programs, such as Social Security, funded through payroll or other taxes. The other forty (40) or more states usually just require that an employer maintain insurance either with a private insurer or an optional state insurance fund or qualify as a self-insurer as larger companies such as defendants generally do. See, generally, Malone, Plant & Little, *The Employment Relation*, 82-83 (1974). If the lawyer did actually render the broadly-based conclusions of Revenue Ruling 68-243 in ignorance of the general practice and without independent investigation, that only serves to confirm the uselessness of the ruling as a careful and persuasive analysis of the issues presented.

"retirement benefits" similar in nature and purpose to normal age and service pensions. Treasury simply decided that any program requiring employer contributions was sufficiently similar to Social Security to allow an offset. A narrow focus on this feature as the sole criterion for defining offsetable benefits—to the exclusion of the requirement that the benefits to be offset also be a "retirement benefit" capable of "integration" and "correlation" with other benefits under the plan—is the only logical explanation for Treasury's apparent action in subsequently approving plans providing for the offsets of worker's compensation against normal age and service pension benefits.[29]

The rationalization that worker's compensation benefits were similar to "disability pension benefits" and "offsetable" on that ground was apparently never even thought of until the preparation of Revenue Ruling 78-178, after cases on this question had been filed, and concurrently with Treasury's preparation of its defense of these cases.[30]

Revenue Ruling 78-178, however, only succeeded in making Treasury's complete lack of understanding of worker's compensation programs more apparent rather than indicating a rational basis for allowing worker's compensation offsets. In holding that governmental unemployment benefits were not permissible offsets to pensions, Treasury incidentally distinguished between benefits for "sickness . . . which include cash benefits and medical services . . ." —which can*not* be offset—and worker's compensation pay-

29. This is also confirmation that Treasury's actions were all along premised on a view which fails to conceive of pensions as deferred wages.

30. The lack of any prior attention to the issue is confirmed by Treasury's failure to notice that it had dropped the crucial word "retirement" from the language of §401(a)(5) in drafting regulation 1.411(a)-4(a).

ments—which supposedly can be offset.[31] Anyone with even minimal knowledge of worker's compensation law can only wonder at the arbitrary dividing line in this distinction.

The IRS seems to have premised its ruling on some distinction between "sickness" and "disability."[32] It apparently reasoned that worker's compensation fell in the latter category on an erroneous assumption that the concept of "disability" for worker's compensation purposes was synonymous with the much narrower concept of total and permanent "disability" utilized in the Social Security Act and in defining the eligibility criteria for a disability pension. The result of that mistake is a guideline based on nothing more than an arbitrary semantic distinction.

The concept of "disability" for purposes of worker's compensation and occupational disease statutes is extremely broad. It generally extends to cover any work-related sickness or injury which causes an employee to incur medical expenses or impairs his ability to earn wages at the same level he enjoyed before the injury. See generally, Malone, Plant & Little, *The Employment Relation*, pp. 371-395 (1974). The "disability" triggering the payments can be either temporary or permanent and need not result in the employee's complete inability to work. *Id.* The benefits provided under the statutes include both cash benefits for loss of earning capacity and/or loss of bodily members and medical benefits to cover expenses

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31. Despite prior regulations, the Revenue Ruling and Treasuries determination letter procedures, the Raybestos Plan still provides for offsets of both "cash sickness" benefits and unemployment insurance benefits, see n.3, *supra*.

32. A better choice might have been to overrule Revenue Ruling 68-243 because of its obvious errors rather than simply trying to distinguish it. That may not have been politic with these cases pending at the time.

incurred in treating the work-related condition. Malone, Plant & Little, *The Employment Relation*, pp. 365-448 (1974).

There is no way that these benefits can rationally be pigeonholed into one or the other of Treasury's categories on a wholesale basis. Worker's compensation laws can plainly provide both cash and medical benefits for conditions which constitute nothing more than simple "sickness" in the common parlance.[33] Worker's compensation (as well as employer-funded sickness and accident or long-term disability insurance), can, of course, also be triggered by conditions which become so serious as to render the employee completely incapable of any type of further work so as to bring him within the much more stringent definition of "disability" for purposes of the Social Security Act and the eligibility criteria for a qualified disability pension. 42 U.S.C. 423(d); Revenue Ruling 69-5 § 3.01, C.B. 1969-1, p. 125. The point is not that there is no connection between worker's compensation and "disability." It is simply that the semantic line drawn in Revenue Ruling 78-178 between "sickness" and "disability" provides no rational basis for concluding that worker's compensation is a form of "retirement benefit" which can be offset against any type of pension benefit.

The Third Circuit assumed rational analysis on the part of Treasury that (1) worker's compensation benefits are "retirement benefits" because they are similar to a "disability" pension, and (2) that this status as a "retirement benefit" allows their offset against not merely "disability" pensions, but also normal age and service benefits. The rulings do not rationally support these conclusions.

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33. This is particularly apparent in the case of benefits under an occupational disease statute.

The bottom line is that the IRS never had and evidently still does not have an adequate understanding of the theory, operation, effects, and benefits of worker's compensation programs. It clearly did not realize, when it issued Revenue Ruling 68-243 that worker's compensation benefits are a direct obligation of the employer which replaces the employee's common law tort action for damages. It apparently did not understand when it issued Revenue Ruling 78-178, some ten (10) years later, the broad concept of "disability" in worker's compensation or the fact that worker's compensation pays both cash and medical benefits. In all the twelve (12) years since the initial ruling, Treasury has never once come to grips with the issues presented by, among other things, offsets of medical benefits, specific loss payments, settlements, and attorneys' fees incurred in collecting benefits—in marked contrast to its complex rules on "integration" of Social Security benefits. It simply never realized that these problems and issues existed until these cases arose.

The suggestion is implicit in the decision below that agency lawyers drafting isolated revenue rulings in this informational void somehow 1) made a carefully reasoned analysis of ERISA (even before it was enacted) and of worker's compensation and occupational disease statutes throughout the country; and 2) concluded that the operation and purposes of such statutes justified an unlimited offset of benefits under a worker's compensation program against any type of benefits under a pension plan. The suggestion would be amusing were it not for the harsh consequences visited on injured workers.

3. Congressional approval of Social Security old-age benefits offsets demonstrates no intent to make a further implied exception for unlimited worker's compensation offsets.

Defendants and the Court below assert that Congress' failure to make Social Security integration, concededly permitted, a specific exception to §203(a) and I.R.C. §411, demonstrates that the nonforfeitability exceptions set forth in §203(a)(3) are not exclusive. From this premise, they leap to the illogical conclusion that therefore worker's compensation offsets are permissible without attention to either the statute or the significant differences beween the two types of benefits and offsets.

The decision below criticizes plaintiffs for failing to recognize, per the court, that ". . . the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits . . .", *Buczynski v. General Motors, supra,* 616 F.2d at 1246, (emphasis by the Court), so as to make ". . . any purported distinction between the Social Security offset and the Worker's Compensation offset meaningless . . .", *id.* With all respect, it is the court which erred in overlooking at least two major statutory facts: (1) that Social Security "disability" benefits terminate at age 65, 42 U.S.C. 423 (a)(1)(B), 42 U.S.C. 402(a)(3), so that it does not follow "perforce" that Congressional approval of Social Security offsets contemplated offsets of "disability" benefits against normal age and service benefits; and (2) the "normal retirement benefit" guaranteed in §3(22) of ERISA itself, 29 U.S.C. 1002(22), explicitly provides that "[t]he normal retirement benefit shall be determined without regard to . . . (B) disability benefits. . . ." These statutory provisions plainly indicate that any rationale, by either the Court

below or Treasury, for allowing offsets of worker's compensation benefits against an employee's "normal retirement benefit" is contrary to law.

The Court's implicit premise, that Social Security offsets must fall within the statute's prohibition of forfeitures if worker's compensation offsets would, similarly is not true. ERISA §203(a), 29 U.S.C. 1053(a), requires that the normal retirement benefit be "nonforfeitable upon the attainment of normal retirement age." The Congressionally authorized offset of Social Security *old-age* benefits is frozen at retirement (if not already frozen by earlier separation from service, ERISA §206(b), 29 U.S.C. §1056(b); I.R.C. §401(a)(15), 26 U.S.C. §401(a)(15)). The Social Security offset thus does not violate the statute by reducing benefits after normal retirement. Worker's compensation offsets do.

The other problem with this argument is that it moves from the specific to the general—a logical fallacy. Acceptance of this fallacy opens Pandora's box. Taken to its logical conclusion, since Social Security is not mentioned, all which is not expressly prohibited is permitted. Therefore, any offset against vested pension benefits is permissible so long as care is taken to phrase the forfeiture in terms of an offset. Obviously such a syllogism completely destroys §203(a) of ERISA and the concepts of vesting and nonforfeitability as the exception swallows the rule.

For example, under this same reasoning, offsets, reductions, and suspensions of pension benefits to persons who work for competitors or who otherwise violate "bad boy" clauses would be permissible notwithstanding clear Congressional prohibition under ERISA's broad nonforfeitability rules and in the legislative history, *H.R. Rept. 93-807* (Ways and Means Committee, 93d Cong., 1st Sess.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670,

4725-4726; *S. Rept. 93-383* (Finance Committee, 93d Cong., 1st Sess.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4890, 4934-4935; *Accord: Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307, 311 (8th Cir. 1979). Compare Revenue Ruling 71-92, I.R.B. 71-7 ("misconduct" forfeiture provision does not disqualify plan, even though "misconduct" not defined, so long as evenly applied). All that would be needed would be ingenious drafting to revise the plan to "offset" any earnings or profits in competitive employment, or of kickbacks, or other arguably undeserved remuneration received on account of other "disloyalty" to the sponsor of the pension plan. Congress plainly intended it to be more difficult than that to evade ERISA.

Finally, the situation of Social Security offsets is unique and simply proves nothing whatsoever with respect to worker's compensation offsets. Social Security offsets are explicitly and directly authorized in §204(b) and §206(b) of ERISA, 29 U.S.C. §1054(b) and §1056(b)—enacted at the same time and as part of the very same subtitle as §203—reflecting, after long Congressional debate, Congressional acquiescence in integration of Social Security benefits as a financially necessary support of the pension system. See, *H.R. Rept. 93-807* (Ways & Means Comm.), reprinted in [1974] U.S. Code Cong. & Adm. News at 4670, 4695-4696; and Supplemental Views of Representatives Corman & Gibbons, reprinted in [1974] U.S. Code Cong. & Adm. News at 4833, 4835-4837.[34] There is, moreover, little

34. Defendants consistently fail to take note of this specific Congressional consideration of Social Security offsets in the context of ERISA itself. They also consistently overlook the fact that the Tax Code language on Social Security offsets is in a new section, Section 401(a)(15) of the Internal Revenue Code—which says not a single word about worker's compensation nor even about "retirement benefits ... under State ... law"—not Section 401(a)(5) on which defendants rely. The new provision's relationship to the other provisions of ERISA's vesting requirements is the result of lengthy development in both the labor and tax-oriented versions of the bills leading to ERISA, see, *H.R. 9824 (As Introduced)*, re-

in Social Security offsets which interferes with anyone's expectancies because they are widely publicized and are calculable at any point in time.

This contrasts markedly with worker's compensation offsets, whose alleged statutory authorization lies only in Treasury's erroneous assertion that they fall into the separate pre-ERISA anti-discrimination exception for "retirement benefits . . . under State law." They fall unexpectedly on a worker in his later years to deprive him of his pension.

II. Congress has expressly saved New Jersey's Worker's Compensation law from pre-emption by ERISA.

The second issue in this case is whether Congress intended to pre-empt New Jersey's worker's compensation law and, at least in the circumstances of this case, to leave workers without any remedy for work-related injury. The issue concerns a recent modification of the anti-assignment clause in the New Jersey worker's compensation law to provide that:

> "34:15-29. *Compensation preferential lien; claim not assignable; set offs*
>
> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed

printed in I Legislative History of the Employee Retirement Income Security Act, 695, 749-750 (hereafter, "ELH"); *H.R. 2 (As Reported from H Educ & Labor Comm)*, II ELH, 2251-2252, 2310. *H.R. 12481 (As Reported from H. Ways & Means)*, II ELH, 2407; *H.R. 12855 (As Introduced)*, II ELH 2936-2937, 3002; *H.R. 2 (H.R. 12906) (As Introduced)*, II ELH 2772, 2843; *H.R. 2 (As passed by the House)*, III ELH 3909, 3980-3981. *H.R. 2 (As Reported from Conference)*, III ELH 4286, 4309, 4320. See also: *Caterpillar Tractor v. Comm'r of Internal Revenue*, 72 T. C. No. 89, 1979 C.C.H. T.C. Reg. Dec. ¶36,316, 260 B.N.A. Pens Reptr. D-6 (Tax Ct. 1979).

> by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*"

N.J.S.A. §34:15-29, as amended by L. 1977, c. 156 Section 1, eff. July 14, 1977. (Emphasis added). The Third Circuit held the provision pre-empted by ERISA. Its conclusion in fact violates Congressional intent that ERISA not affect state worker's compensation and insurance laws [35] and, once again, its analysis puts form before substance.

The core of the conflict revolves around the tension between the broad pre-emption of provisions of ERISA §514(a), 29 U.S.C. 1144(a), and the equally strong and opposite provisions—not mentioned in the Court's opinion —rendering ERISA and its pre-emption provision inapplicable to state worker's compensation and insurance laws. ERISA §§4(b)(3), 514(b), 29 U.S.C. 1003(b)(3), 1144 (b); *H.R. Rept. 93-1280* (Conf. Comm.) reprinted in [1974] U.S. Code Cong. & Adm. News at 5038, 5162. The tension is one which must be resolved by analysis of Congressional intent and policies.

Worker's compensation programs are among the most historically safeguarded of state responsibilities, reflecting careful legislative compromises between the employee's

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35. Worker's compensation benefits are typically provided through compulsory coverage with an independent insurance carrier. The particular defendants in these cases, Raybestos Manhattan, Inc. and General Motors, are both financially sound enough to qualify as "self-insurers" under a special provision of New Jersey law. See generally, Malone, Plant & Little, *The Employment Relation*, p. 83 (1974).

need for compensation, the employer's need for a fixed and determinable liability, and the public need to encourage economic growth while simultaneously providing incentives to employers to protect their workers' health and safety. The delicate nature and result of such legislative compromise has led the courts to accord broad deference to the states in this area. As the Court stated in *DeCanas v. Bica*, 424 U.S. 351, 356 (1976):

> "States possess broad authority under their police powers to regulate the employment relationship and to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *workmans' compensation laws are only a few examples.*" (Emphasis supplied)

Congress reinforced this "hands-off" policy by its express exemption of worker's compensation programs from ERISA.

Congress did, on the other hand, plainly intend to give broad pre-emptive effect to ERISA over state laws "relating to" employee benefit plans in order, among other things, to allow the plans of multi-state employers to be administered on a uniform basis across the country. That purpose is not advanced by pre-empting the provisions of a state worker's compensation law.

It is apparent as a general matter that the operation and effect of a worker's compensation offset necessarily and inevitably varies with the provisions of state worker's compensation laws. It is state law which determines whether any worker's compensation benefits are payable in the first place. It is state law which may determine whether the offset is applicable in the first place in the case of plans—such as that of defendant General Motors in the

consolidated case—which do not offset all types of worker's compensation benefits and as to which state law will vary in determining whether one or another type of benefit is payable.[36] It is state law which determines whether worker's compensation is an employee's exclusive remedy for personal injury in the workplace—thereby forcing him to the choice between taking his pension at the expense of worker's compensation or vice versa—or whether he will be allowed to sue at common law—thereby to attempt to preserve both his pension and his right of compensation for personal injury. It is, finally, state law which determines the amount of worker's compensation and thus the amount of any offset. Neither the language nor the policies of the basic pre-emption clause in ERISA would be served by overriding the explicit Congressional protection of state law determinations thus made or the state clause of present concern prohibiting assignment of worker's compensation benefits.

The Court of Appeals decided the pre-emption issue in a literal reading of the phrase in ERISA pre-empting state statutes that "relate to any employee benefit plan." 29 U.S.C. 1144(a). But the issue of pre-emption is not simply one of semantics. If it were, the New Jersey legislature need only put its prohibition in different terms in order to preserve the effectiveness of its worker's compensation program.

For example, it could simply convert the form of worker's compensation benefits for retirees to the format of common law tort damages and thus—at least, under present rules—enact the very same prohibition without any interference. It could alternatively simply increase the

36. An example is the exception in the General Motors Plan for schedule injury benefits "specifically allocated for ... fixed statutory payments for loss of any bodily member." See generally, 2 Larsen, *Worker's Compensation Law*, ¶¶58.00-58.40.

worker's compensation benefits payable to counter any pension plan offset. In neither event could any complaint of pre-emption be raised under any "dictionary" test of ERISA, because the prohibition, although the same in effect, would only talk about the terms for worker's compensation benefits, not pensions.

The situation here cannot rationally be distinguished from that of employee benefit plans providing benefits through other sorts of insurance in which the ERISA-exempt insurance contract remains subject to state law. See, e.g., *Wayne Chemical v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir., 1977); *Eversole v. Metropolitan Life Ins.*, —— F. Supp. ——, 318 B.N.A. Pens. Rptr. D-8 (C.D. Calif., 1980); see also, *Cate v. Blue Cross*, 434 F. Supp. 1187 (E.D. Tenn., 1977).

Consider, by way of example, the absurdity of distinguishing between the applicabilty of the New Jersey statute to a pension plan which provides benefits through ERISA-exempt insurance company annuities and one which does not. The one funded through annuities would clearly remain subject to the state probibition on offsets in the drafting of any "coordination of benefits" clause in the insurance contract, ERISA, §514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A), while the other would not under the Third Circuit's mechanical view of pre-emption. ERISA's purpose to protect state worker's compensation programs and insurance regulation is simply dominant over the otherwise generalized pre-emption clause of the statute, whose purposes cannot be served in the circumstances.

Finally, it must be said that the New Jersey Legislature's command is consistent with ERISA. It is consistent not only with Section 203(a), but with ERISA's own purpose to insure pension benefits against loss through as-

signment or alienation for the benefit of a third-party; namely, the employer, ERISA, §206(d), 29 U.S.C. 1056 (d). It is perhaps, the concept of "integration" which the IRS would have reached if it had demonstrated any expertise in worker's compensation when it started approving the offsets contained in these plans. It is, finally, New Jersey's sovereign exercise of its statutorily protected right to maintain and enforce its own proper view of the balance of interests to be made in worker's compensation programs.

ERISA gives employee benefit plans the right to run their affairs in accordance with uniform federal regulations free from state taxes, or other regulations to complicate their internal operation. It does not make employee benefit plans a vehicle to allow the employer to exempt himself from the requirements of traditional state programs—such as worker's compensation and insurance laws—whose continuation, effectiveness, and enforceability are expressly saved in the statute.

CONCLUSION

It is incontestable that Congress indicated its intent in ERISA to consider pensions as deferred wages not subject to loss for any reason—even as to healthy workers who become re-employed at wages exceeding their benefits and as to employees who steal from or cheat their employers for more than the value of their pension benefits.

Could Congress have rationally intended that the honest, disabled worker, who loyally toils for his employer throughout his lifetime until suffering a work-related injury, would be less favorably treated and would be forced to suffer a loss of the pension he had already fully earned before suffering such injury?

We submit not. The decision of the Third Circuit should be reversed and the Judgment of the District Court should be reinstated.

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STATUTORY APPENDIX

United States Constitution, Article VI, cl. 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

26 U.S.C. §401(a)(5).

> (5) A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b) (without regard to paragraph (1)(A) thereof) merely because it excludes employees the whole of whose remuneration constitutes "wages" under section 3121(a)(1) (relating to the Federal Insurance Contributions Act) or merely because it is limited to salaried or clerical employees. Neither shall a plan be considered discriminatory within the meaning of such provisions merely because the contributions or benefits of or on behalf of the employees under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, or merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from "wages" by section 3121(a)(1) differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of any retirement benefits created under State or Federal law. For purposes of this paragraph and paragraph (10), the total compensation of an individual who is an employee within

the meaning of subsection (c)(1) means such individual's earned income (as defined in subsection (c)(2)), and the basic or regular rate of compensation of such an individual shall be determined, under regulations prescribed by the Secretary, with respect to that portion of his earned income which bears the same ratio to his earned income as the basic or regular compensation of the employees under the plan bears to the total compensation of such employees. For purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate. For the purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates. For purposes of determining whether one or more plans of an employer satisfy the requirements of paragraph (4) and of sec-

tion 410(b), an employer may take into account all simplified employee pensions to which only the employer contributes.

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. §1002(22)

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall

be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

29 U.S.C. §1053(a)

§1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additonal year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this titie.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

29 U.S.C. §1056(b)

Decrease in plan benefits by reason of increases in benefit levels under Social Security Act or Railroad Retirement Act of 1937

(b) If–

(1) a participant or beneficiary is receiving benefits under a pension plan, or

(2) a participant is separated from the service and has nonforfeitable rights to benefits,

a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable

under title II of the Social Security Act or the Railroad Retirement Act of 1937, or any increase in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation.

29 U.S.C. §1144.

§1144. Other laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company

or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or super-

sede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 U.S.C. §1202(c).

(c) Regulations proscribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter 1 of this chapter which include 29 U.S.C. §1053(a). Except as otherwise provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

N.J.S.A. §34:15-29.

34:15-29. Compensation preferential lien; claim not assignable; set offs

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or pay-

ments but shall not be set off against employees' retirement pension benefits or payments.

26 C.F.R. §1.411(a)-4(a)

§1.411(a)-4 Forfeitures, suspensions, etc.

(a) Nonforfeitability. Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time. Certain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable. Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation. Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account

in determining plan benefits. To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards, or the nondiscrimination requirements of section 401(a)(4), they may be forfeited without regard to the limitations on forfeitability required by this section. The right of an employee to repurchase his accrued benefit for example under section 411(a)(3)(D), is an example of a right which is required to satisfy such standards. Accordingly, such a right is subject to the limitations on forfeitability. Rights which are required to be prospectively nonforfeitable under the vesting standards are nonforfeitable and may not be forfeited until it is determined that such rights are, in fact, in excess of the vesting standards. Thus, employees have a right to vest in the accrued benefits if they continue in employment of employers maintaining the plan unless a forfeitable event recognized by section 411 occurs. For example, if a plan covered employees in Division A of Corporation X under a plan utilizing a 10-year-100 percent vesting schedule, the plan could not forfeit employees' rights on account of their moving to service in Division B or Corporation X prior to completion of 10 years of service even though employees are not vested at that time.

Revenue Ruling 78-178:

Advice has been requested whether unemployment compensation benefits constitute "retirement benefits created under State or Federal law" within the meaning of section 401(a)(5) of the Internal Revenue Code of 1954, and may therefore be used as an acceptable offset against benefits under a pension plan qualified under section 401(a) of the Code.

Section 401(a)(5) provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.

Section 1.401-4(b) of the Income Tax Regulations limits the State or Federal programs that may be used as an offset so that the total benefits resulting under the plan and under the program must establish an integrated and correlated retirement system satisfying the tests of section 401(a).

Revenue Ruling 68-243, 1968-1 C.B. 157, provides that benefits from programs that require employer contributions and make benefits available to the general public may be offset against benefits under a qualified pension plan.

Unemployment compensation laws do require employer contributions and are available to the general public. The issue is whether unemployment compensation benefits together with qualified pension plan benefits establish an integrated and correlated retirement system. There are many types of benefits under public programs that do not lend themselves to integration with private pension plan benefits. Thus a correlated retirement system could not exist. Only those programs which provide benefits that may be provided under a qualified pension plan may be used as an offset since only then could a correlated retirement system exist. For example, the benefits payable under State or Federal programs because of sickness and maternity, and which include cash benefits and medical services, may not be used as an offset to pension plan benefits because such benefits may not

be provided under a qualified pension plan. See section 1.401-1(b)(1)(i) of the regulations.

Unemployment compensation benefits are paid for temporary periods of layoff. Under section 1.401-1(b)(1)(i) of the regulations, a qualified pension plan may not provide layoff benefits. Consequently unemployment compensation falls into the broad category of State and Federal programs that may not be used as an offset to qualified pension plan benefits since such type of benefits may not be provided under a qualified pension plan.

Revenue Ruling 68-243 allows the offsetting of pension plan benefits by the benefits payable under workmen's compensation laws and other occupational diseases laws. These benefits are payable upon an employee's disablement. Section 1.401-1(b)(1)(i) of the regulations specifically allows the payment of pension plan benefits upon disability. Therefore these programs may be used as an offset to plan benefits. Because workmen's compensation laws are distinguishable from unemployment compensation laws, Revenue Ruling 68-243 should not be construed as allowing an offset for unemployment compensation benefits.

This Revenue Ruling is effective on the first day of the first plan year commencing after December 31, 1978.

In the case of a person employed at any time by the employer on or after the effective date of this Revenue Ruling, the offset for unemployment compensation benefits may not be applied on or after the first date after such effective date on which such person is so employed. In the case of a person who leaves the employ of the employer before such effec-

tive date and who is not reemployed by the employer on or after such effective date, such offset may be applied to reduce such person's benefits.

Revenue Ruling 68-243.

Advice has been requested whether "public disability benefits" as defined in the plan described below constitute "retirement benefits created under State or Federal law" within the meaning of section 401(a)(5) of the Internal Revenue Code of 1954 and are acceptable offsets against benefits under a qualified employees' pension plan.

An employer established a pension plan that was intended to qualify under section 401(a) of the Code. The plan provides that benefits thereunder will be offset by public disability benefits. The term "public disability benefits" is defined in the pension plan as including (1) disability payments under any workmen's compensation law or occupational diseases law (except fixed statutory payments for the loss of any bodily member) or (2) any disability damages recovered from the employer under common law.

Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.

The effect of section 401(a)(5) of the Code is to permit total benefits, inclusive of those provided under the social security or similar program, to be used for comparative purposes. See Part 4(j) of Revenue Ruling 65-178, C.B. 1965-2, 94. A program, like the Social Security program, that requires employer contributions and makes benefits available to the general

public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.

Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.

Since the benefits payable under a workmen's compensation law or occupational diseases law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer.

No. 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees,

STATE OF NEW JERSEY,

Intervenor.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF APPELLEES

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Appeal Docketed June 19, 1980
Probable Jurisdiction Noted November 3, 1980

QUESTIONS PRESENTED

The Raybestos retirement plan is a private, defined benefit plan. In determining retirement income under this private plan, a deduction, or "offset", is made for any income amount the participant also is paid during retirement under the workers' compensation program.

1. Is this determination of private retirement income, which includes the workers' compensation deduction, prohibited by the minimum vesting standards of Section 203(a) of the Employee Retirement Income Security Act of 1974 (ERISA)?

2. Does ERISA preempt the 1977 New Jersey statute prohibiting this deduction for workers' compensation in determining private retirement income?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are set forth at pages i-ii of Appellants' Brief to the Court.*

*Pursuant to Rule 28.1 of the Rules of the Court, the subsidiaries (except wholly-owned subsidiaries) and affiliates of appellee Raybestos-Manhattan, Inc. are: Manufacturas Multiples, S.A.; Daikin-R/M, Ltd.; and Itapsa, S.A. D.E. C.V. Raybestos-Manhattan, Inc. has no parent company.

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Authorities Cited

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Railroad Retirement Act of 1935, as amended by the Railroad Retirement Act of 1937, as amended by the Railroad Retirement Act of 1974, P.L. 93-445, 88 Stat. 1305, 45 U.S.C.:

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Conf. Rep. 93-1280, 93d Cong., 2d Sess. (1974)	8, 25-27, 30, 37
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H.R. 2, 93d Cong., 2d Sess. (March 4, 1974)	36
H.R. Rep. 93-807, 93d Cong., 2d Sess. (1974)	14, 17, 27, 30
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S. Rep. 93-383, 93d Cong., 1st Sess. (1973)	25
S. Rep. 93-1163, 93d Cong., 2d Sess. (1974)	21
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ERISA Improvements Act of 1978 (S 3017), 124 Cong. Rec. S 6581 (May 1, 1978)	15

AUTHORITIES CITED

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MISCELLANEOUS:

ERISA Improvements Act of 1979 (S 209), 125 Cong. Rec. S 557 (January 24, 1979) 15

Holmes, The Common Law (1881) 11

Larson, Basic Concepts and Objectives of Workmen's Compensation Laws, I Supplemental Studies of the National Commission on State Workmen's Compensation (Gov. Printing Office 1973) 23

Larson, The Law of Workmen's Compensation (1978 ed., 1980 ed.) 22, 24

Lubove, The Struggle for Social Security (Harv. Univ. Press 1968) 20

Legislative History of the Employee Retirement Income Security Act of 1974, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) ..... *passim*

Reorganization Plan No. 4 of 1978 30

Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525 (1951) 24

Rule 28.1 of the Rules of Court ii

STATEMENT OF THE CASE

Appellee Raybestos-Manhattan, Inc. ("Raybestos") sponsors the appellee Raybestos-Manhattan, Inc. Employee Retirement Plan (the "Raybestos plan"), which is a private, employee benefit plan.

The appellants are former Raybestos employees who retired in 1972 or 1973. They are each eligible for the income benefits as determined under the terms of the Raybestos plan. (J.A. 15a-16a)

The Raybestos plan (which was arrived at through collective bargaining) integrates with income amounts paid during retirement under a workers' compensation program. That is, in determining benefits, the Raybestos plan requires a deduction equal to the amount of any income benefits the participant also is paid during retirement under a state workers' compensation program. (J.A.9a,13a,16a)[1] These amounts received under the workers' compensation program are also financed by Raybestos. N.J. Stat. 34:15-7, 34:15-70, *et seq.*

After being retired from Raybestos for four or more years, each appellant was found eligible for workers' com-

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1. Article VI, section 4(b) of the Raybestos plan, under which the retirement income of the appellants is determined, provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income. (J.A. 16a)

Appellants, all of whom retired prior to 1974, assume that this provision is identical to the benefit formula which governs the calculation of income benefits for participants retiring on and after January 1, 1976 (see Appellants' Brief, 36 n.31). Although not material to the appellants, the benefit formula for post-ERISA retirees also includes a deduction for workers' compensation payments.

pensation payments under the New Jersey Workers' Compensation Law, N.J. Stat. 34:15-7, *et seq.* The determination of retirement income under the Raybestos plan therefore included a deduction of an amount equal to the income benefits paid concurrently under the workers' compensation program.[2]

A similar offset is included in determining retirement income under the private plan at issue in *Buczynski, et al. v. The General Motors Corporation,* No. 80-193, petition for certiorari granted November 3, 1980, with which this case has been consolidated by the Court.

Appellants in this case and petitioners in *Buczynski* ("petitioners") state that this prescribed deduction in determining private retirement income violates the minimum vesting standards set forth in ERISA Section 203(a), 29 U.S.C. §1053(a).

Their analysis is that: (*i*) under the minimum vesting standards of ERISA Section 203(a), upon satisfaction of certain age and service criteria, the right to normal retirement income under the plan is "nonforfeitable", *i.e.,* the right is established and may not be extinguished; (*ii*) work-

---

2. The date and aggregate amount of the workers' compensation award for each appellant was: Joseph Alessi, November 30, 1977, $6,470; Raymond Buisson, October 20, 1977, $6,760; Stephen Michalski, November 9, 1977, $4,380; Charles Repka, August 8, 1977, $6,200; and T. Edward White, November 21, 1977, $6,170. (J.A. 17a)

The following deductions for those payments were made monthly under the benefit formula of the Raybestos plan: Joseph Alessi, $173; Raymond Buisson, $154; Stephen Michalski, $170; Charles Repka, $173; and T. Edward White, $158. (J.A. 17a)

Appellants wrongly imply that the Raybestos plan also deducts any medical expenses paid by Raybestos with these income benefits under the workers' compensation program (see Appellants' Brief, 35-36). Appellants also seek to color the case with certain assertions not part of the record (*e.g.,* appellants' ages at retirement from Raybestos) (see Appellants' Brief, 2-3).

ers' compensation integration, by lowering income benefits under the plan by an amount equal to income benefits also paid during retirement under the workers' compensation program, imposes a condition on their claim to retirement income, *i.e.*, without integration, the income determined under the plan would be greater; and (*iii*) because workers' compensation integration is not listed as an exception to the minimum vesting rules[3] and is not affirmatively authorized in ERISA, it is prohibited and can no longer be used as a factor in determining private retirement benefits.

Appellants and petitioners also assert that the New Jersey law which prohibits workers' compensation integration in determining private retirement income is not preempted by ERISA.

SUMMARY OF THE ARGUMENT

No law compels employers to establish private retirement plans. Employers are free to provide, or not to provide, retirement income for their employees. In agreeing to a retirement program, employers may decide what level of retirement income they will agree to finance, as well as how these income benefits will be determined.

One common method of determining income benefits under a private plan is in coordination with employer financed statutory income benefits. This is known as "integration".

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3. The exceptions to the minimum vesting rules are set forth in ERISA Section 203(a)(3), 29 U.S.C. §1053(a)(3), and the same exceptions are set forth for tax qualified plans in Section 411(a)(3) of the Internal Revenue Code of 1954 (IRC), 26 U.S.C. §411(a)(3). As we argue *post*, workers' compensation integration is not listed as an exception to the minimum vesting rules because statutory benefit integration, in determining the amount of plan income, is not regulated by the vesting rules in the first place. Integration only goes to the amount of the benefit.

The object of an integrated pension plan, whether it integrates with social security, railroad retirement, workers' compensation or similar statutory income benefits, is to assure to private plan participants a particular, defined, post-retirement level of income, all financed by the plan sponsor. Retirement income needs are balanced with employer costs. Whether the income benefits originate entirely from the plan fund, or are paid in tandem from the plan fund and these other employer financed income sources, the participant receives (and has an enforceable claim to) the defined income level during retirement.

The Raybestos and General Motors plans have for many years integrated private retirement income with any income amounts also paid to participants during retirement under the workers' compensation program. This, and only this, is the private retirement benefit agreed to be financed by the plan sponsor and historically it has been approved by the federal agency charged by Congress with administering the pension laws, both prior to and since the enactment of ERISA.

Two questions are presented:

1. Is this determination of private retirement income, which was decided upon by the parties, prohibited by the minimum vesting standards of ERISA Section 203(a)?

2. Is the New Jersey statute prohibiting this method of determining private retirement income preempted by ERISA?

(1)

The minimum vesting standards of ERISA do not prohibit, or address, permissible or impermissible statutory benefit integration in defining private retirement income.

The vesting standards only establish the time periods after which a participant's *claim* to pension is fixed. The

vesting standards do not regulate what the income amount from the plan will be or how the amount will be determined. In determining private retirement income benefits, integration with statutory income benefits also paid to the participant (and also financed by the plan sponsor) does not cause a forfeiture of the participant's claim. The claim to the employer financed, integrated benefit assured by the private plan is not forfeited or extinguished; only the amount determined and paid under the private plan is reduced, as agreed by the parties.

Statutory benefit integration in determining private retirement income is regulated by entirely separate provisions of ERISA, ERISA Section 206(b) and IRC Section 401(a)(15), and those separate provisions do not prohibit integration with income amounts also paid to participants during retirement under the workers' compensation program.

Prior to enacting ERISA, Congress carefully studied the existing private retirement system. Under ERISA, Congress added to that system the minimum rules and restrictions which experience had indicated were necessary. In considering the effect of ERISA on existing retirement plans, it is important to understand what Congress did not change. In its pre-ERISA Revenue Rulings and comprehensive Guides for Pension Plan Qualification, the Internal Revenue Service consistently permitted private plans to integrate with the workers' compensation program. Congress was familiar with the Internal Revenue Service's Revenue Rulings and Guides on statutory benefit integration and, although it had certain misgivings about benefit integration and stated that the matter merited further study, Congress determined to preserve those rules.

Finally, Treasury Reg. §1.411(a)-4(a), 26 C.F.R. §1.411(a)-4(a), which was promulgated shortly after the enactment of ERISA, approves integration with workers' compensation in determining private retirement income. It provides:

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Treasury Reg. §1.411(a)-4(a) recognizes that there is no conflict in ERISA between statutory benefit integration in determining private plan benefits and the requirement that a participant's claim be nonforfeitable. That Regulation reasonably implements the statute and, therefore, must be sustained as valid.[4]

(2)

ERISA Section 514(a), 29 U.S.C. §1144(a), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Congress carefully formulated this preemption clause and intended federal preemption of state law to be as broad as this statutory language dictates. N.J. Stat. 34:15-29, as amended by Chapter 156 of the New Jersey Laws of 1977, prohibits private plans covered by ERISA from integrating private retirement income with income amounts also paid during retirement under the New Jersey workers' compensation program. Because this state statute invalidates the plan provision by which these private retirement benefits are determined, it is preempted by ERISA.

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4. If the Court invalidates this Treasury Regulation, however, and construes the vesting rules of ERISA as also regulating statutory benefit integration, those vesting rules would not apply in any event to individuals who were not "employees" on or after the 1976 effective date of ERISA Section 203(a). See General Motors' Brief and Reply Brief to the Third Circuit below, pages 9 n.3 and 14 n.18 respectively; Treasury Reg. §1.411(a)-2(f), 26 C.F.R. §1.411(a)-2(f); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 569 (1979). In sustaining Treasury Reg. §1.411(a)-4(a), above, as valid, the Third Circuit did not reach or decide this issue.

ARGUMENT

I. WORKERS' COMPENSATION INTEGRATION IN DETERMINING PRIVATE RETIREMENT INCOME DOES NOT VIOLATE THE MINIMUM VESTING STANDARDS OF ERISA SECTION 203(a).

Following an exhaustive study of the private retirement system, Congress enacted the Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 Stat. 829 (ERISA). While broad in scope, ERISA reflects a balance between the need to enact minimum rules and restrictions in areas acknowledged by Congress to be deficient, and the corresponding need to keep employer costs within reasonable limits.

Congress recognized that this is a voluntary system. In order to continue to stimulate growth in this voluntary system, Congress determined that it should impose only those particular new requirements which, after close study of cause, effect and cost, were considered necessary. As Representative Perkins stated during the consideration of ERISA:

> The subject of welfare and pension plans reform is a very complex and difficult one. . . . It has not been easy to draft a law which protects individual pension rights and at the same time, recognizes the voluntary nature of pension plans.
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> Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result.[5]

In response to a concern that vesting under existing plans was inadequate, Congress enacted the minimum

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5. Remarks of Representative Perkins, *reprinted in* II Legislative History of the Employee Retirement Income Security Act of 1974, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) ("Leg. Hist.") 3369.

vesting standards set forth in ERISA Section 203(a), 29 U.S.C. §1053(a), and IRC Section 411(a), 26 U.S.C. §411(a).[6]

Under the new vesting standards, private retirement plans must provide that an employee who reaches normal retirement age will be given a nonforfeitable right to his normal retirement benefit. ERISA Section 203(a), 29 U.S.C. §1053(a). This requirement was carried over from existing regulatory requirements for tax qualified plans.[7] Private retirement plans must now also provide under ERISA that an employee, at various stages of his employment career prior to retirement, will be given a nonforfeitable right to part or all of his accrued benefit. ERISA Section 203(a)(2), 29 U.S.C. §1053(a)(2). This permits portability of the participant's claim, rather than loss of that claim upon leaving employment prior to normal retirement age.

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6. The full text of ERISA Section 203(a) is set forth at pages 1a-5a of the Appendix to this Brief, *post*.

ERISA Section 203(a) is part of Title I of ERISA, Sections 2 through 514, 29 U.S.C. §§1001-1144, the so-called "labor provisions". IRC Section 411(a) is part of Title II of ERISA, Sections 1001 through 2008, which amends and supplements the provisions of the Internal Revenue Code covering qualifications of pension plans for favorable tax treatment.

Titles I and II of ERISA, the labor and tax provisions, contain identical minimum standards for participation, vesting and funding in private pension plans. However, the tax provisions contain certain additional restrictions for plans seeking "qualified" status which are not included in the labor provisions. For example, there is no requirement in the labor provisions that a plan not discriminate in favor of officers and highly paid employees. Therefore, a private plan which satisfies the requirements of the labor provisions might not "qualify" under the more restrictive provisions of the tax law.

7. "[A]ll plans would have to meet the requirement of present law that an employee must be 100 percent vested in his accrued benefit when he attains the normal or stated retirement age (or actually retires)." Conf. Rep. 93-1280, 93d Cong., 2d Sess., 268 (1974), III Leg. Hist. 4277, 4535.

Under the Raybestos and General Motors plans, workers' compensation integration is one of the agreed upon factors used to determine plan benefits. Appellants and petitioners argue to the Court that this workers' compensation integration now violates the vesting standards of ERISA Section 203(a). The Court of Appeals for the Sixth Circuit, in a 2 to 1 decision, recently agreed. *Utility Workers v. Consumers Power Company,* No. 78-1402 (January 6, 1981), *petition for rehearing en banc pending.*

However, such an application of the vesting rules ignores the language of the statute, as well as the existing pension framework within which the new minimum standards of ERISA were assimilated.

In its opinion below, the Court of Appeals for the Third Circuit carefully analyzed the argument that integration with income benefits under the workers' compensation program is now prohibited by the vesting standards and unanimously concluded that it was not. The Third Circuit considered the painstaking approach by Congress to the existing private retirement system and correctly ruled that ERISA's vesting standards were not intended suddenly to abrogate, without a word to that effect in the statute or its lengthy legislative history, the pre-ERISA approval of integration with the workers' compensation program in determining private retirement income.

A. The Language of the Statute does not Support Appellants' Claim of Forfeiture of a Right.

Effective on or after January 1, 1976,[8] ERISA Section 203(a) and IRC Section 411(a) require private retirement plans to include a provision that upon an employee's satis-

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8. For plans in existence on January 1, 1974, ERISA's minimum vesting standards are first effective for plan years beginning on or after January 1, 1976. ERISA Section 211(b)(2), 29 U.S.C. §1061(b)(2); ERISA Section 1017(b), III Leg. Hist. 4939.

faction of certain age and service criteria, his "right" to retirement benefits is "nonforfeitable". Appellants and petitioners state that this means that private plans may no longer integrate with workers' compensation in determining plan benefits. This is not supported by the language of the statute.

Nonforfeitable is a defined term in ERISA. When modifying the term "right", as in ERISA Section 203(a), it means:

> a *claim* obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. (Emphasis added.)[9]

Therefore, at least as it is used in ERISA Section 203(a) and IRC Section 411(a), nonforfeitable is solely a vesting concept. To qualify for this nonforfeitable claim, certain factual requirements, or conditions precedent, must be satisfied which may not be more stringent than those stated in ERISA Section 203(a) and IRC Section 411(a). Until those tests are met, the employee may only hope to be eligible for retirement income under the plan.

Once the tests are met, however, the right is perfected. Nothing remains to be done to fix the right. And because the right is "nonforfeitable" under the statute, it may not later be extinguished. The employee may not be disqualified from that claim by the occurrence or nonoccurrence of later events. In *Nachman Corporation v. Pension Benefit Guaranty Corporation,* 446 U.S. 359 (1980), Justice Stevens described the term "nonforfeitable" as defined in ERISA as follows:

> [T]he principal subject of the definition is the word "claim"; it is the claim to the benefit, rather

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9. ERISA Section 3(19), U.S.C. §1002(19).

> than the benefit itself, that must be "unconditional" and "legally enforceable against the plan." . . .
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> • • •
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> . . . [T]he term "forfeiture" normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. . . . It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the right to a pension rather than a limit on the amount he may collect.

Id., 371-72.

However, to require that a right to pension be nonforfeitable says nothing of what the pension will be. Right is an abstract term. It is the "legal consequence" which results from certain established facts. Holmes, The Common Law, 214 (1881). A nonforfeitable right is not a right to receive any particular income amount. In each case, the income benefit to which the nonforfeitable right attaches is the benefit defined in and determined under the terms of the particular private plan. On this the statute is clear. The term "nonforfeitable" is defined as "a claim . . . to that part of an *immediate or deferred benefit under a pension plan*. . . ." ERISA Section 3(19), 29 U.S.C. §1002(19) (emphasis added). Likewise "normal retirement benefit", to which appellants and petitioners here assert a nonforfeitable claim under ERISA, is defined as "the greater of the *early retirement benefit under the plan*, or the *benefit under the plan commencing at* normal retirement age." ERISA Section 3(22), 29 U.S.C. §1002(22) (emphasis added).

ERISA sets no minimum income amounts. With certain base parameters,[10] Congress left for the parties to address

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10. For example, plans may not "backload" benefit accruals—that is, provide for accrual of benefits under the plan only during the last few years of employment, if any, before normal retirement age. ERISA there-

and resolve the question of how and in what amount income benefits will be provided under the private plan. Under the Raybestos and General Motors plans, the agreed plan benefit is an *integrated* benefit; it is an amount which includes integration with income amounts also paid during retirement under the workers' compensation program.

On their face the vesting standards of ERISA do not prohibit integration with statutory income programs in defining plan benefits. Nor do the minimum vesting standards differentiate among various statutory benefit integration practices, approving some, disapproving others. The vesting standards simply do not address this subject in any fashion. To conclude otherwise ignores the distinction in the statute between the retirement claim (which vests) and the income amount determined under the particular plan.[11] Thus, it is irrelevant whether the plan integrates with

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fore provides certain alternative minimum "rate" tests (the "133 ⅓%" test, the "3%" test, or the "fractional" test) which serve to spread benefit accrual over an employee's entire active career. See ERISA Sections 204(b)(1)(A), (B) and (C), 29 U.S.C. §§1054(b)(1)(A), (B) and (C); IRC Sections 411(b)(1)(A), (B) and (C), 26 U.S.C. §§411(b)(1)(A), (B) and (C). The accrual formula also may not reduce benefits for active employees on account of increasing age or service. See ERISA Section 204(b)(1)(G), 29 U.S.C. §1054(b)(1)(G); IRC Section 411(b)(1)(G), 26 U.S.C. §411(b)(1)(G). ERISA also imposes a requirement that plan participants be permitted to elect a survivor option so that on the participant's death his beneficiary continues to receive plan income benefits. See ERISA Section 205, 29 U.S.C. §1055; IRC Section 401(a)(11), 26 U.S.C. §401(a)(11).

11. The cases cited by appellants as general support for their position (Appellants' Brief, 12-14) each concern cancellation of the participant's claim. See *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977) *on remand*, 452 F. Supp. 117 (S.D.N.Y. 1978), *aff'd*, 586 F.2d 968 (2d Cir. 1978); *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979); *Amory v. Boyden Associates, Inc.*, 434 F. Supp. 671 (S.D.N.Y. 1976). As Justice Stevens stated in *Nachman Corporation*, above, 446 U.S. 359, 371, "it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.' "

social security, railroad retirement, workers' compensation or other statutory income benefits. The claim to the employer financed, integrated benefit assured by the private plan is not forfeited or extinguished. The integration in determining benefits only reduces the income amount paid from the plan fund (by, in this case, an amount equal to any income amounts provided under the workers' compensation program), as agreed by the parties.

There are, however, certain specific minimum requirements in ERISA on statutory benefit integration. These are set forth in ERISA Section 206(b) ("Other Provisions Relating to Form and Payment of Benefits"), 29 U.S.C. §1056(b), and its tax counterpart, IRC Section 401(a)(15), 26 U.S.C. §401(a)(15). These benefit integration provisions were enacted as part of ERISA, simultaneously with, although separate from, the vesting standards. See III Leg. Hist. 4836, 4871, 4945.

ERISA Section 206(b) provides:

> If—
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> (1) a participant or beneficiary is receiving benefits under a pension plan, or
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> (2) a participant is separated from the service and has nonforfeitable rights to benefits,
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> a plan *may not* decrease benefits of such a participant by reason of any increase in the benefit levels payable under title II of the Social Security Act or the Railroad Retirement Act of 1937, or any increase in the wage base under such title II, if such increase takes place after the date of the enactment of this Act or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation. (Emphasis added.)[12]

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12. IRC Section 401(a)(15) contains an identical restriction, except that it omits any direct reference to the railroad retirement program.

This provision is a codification of the pre-ERISA restriction on qualified plans under the antidiscrimination rules of tax law, as well as the extension of this restriction for participants separated from employment and not yet receiving plan benefits.[13]

Although Congress codified this pre-ERISA restriction on statutory benefit integration, it did not otherwise restrict private plans from integrating with statutory income programs in defining plan benefits. Neither ERISA Section 206(b) nor its tax counterpart, IRC Section 401(a)(15), prohibits plans from continuing to integrate with workers' compensation income payments also financed by the plan sponsor in determining private retirement income. Additional restrictions on statutory benefit integration were considered by Congress, but rejected pending further study.[14]

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13. See H. R. Rep. 93-807, 93d Cong., 2d Sess., 29 (1974), II Leg. Hist. 3115, 3149:

> Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and are already receiving integrated plan benefits. This bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. . . .
>
> These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized.

14. See discussion under Part B, *post*, page 26 and n.27.

Appellants bring to the Court's attention (Appellants' Brief, 19 n.15) Congress' recent consideration of an amendment to the statutory benefit

The structure of the statutory benefit integration provisions of ERISA provides valuable insight into what ERISA does and does not do concerning integration. Considered in a vacuum, ERISA Section 206(b) and IRC Section 401(a)(15) are without substantive meaning—those provisions do not affirmatively *authorize* any statutory benefit integration, but only *restrict* it in a specific respect.[15] These sections draw their significance only in relation to the statutory benefit integration framework which had developed under the pre-ERISA antidiscrimination rules for tax qualified plans. This antecedent benefit integration scheme is the focal point. ERISA Section 206(b) and IRC Section 401(a)(15) acknowledge that antecedent scheme and codify an existing restriction (with, possibly, additional restrictions in future years). Private plan integration with employer financed income benefits under the workers' compensation program was consistently approved for tax qualified plans prior to ERISA (see Part B, *post*), and nowhere in the statute did Congress revoke that approval.

The language of the statute, then, offers no basis to invalidate, and thus substantially to increase, the income

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integration restrictions of ERISA Section 206(b) which would now also restrict plans from integrating with the workers' compensation program (the very issue raised here under the separate vesting standards). See Section 237 of the ERISA Improvements Act of 1978 (S 3017), 124 Cong. Rec. S 6581 (May 1, 1978); Section 126(a)(3) of the ERISA Improvements Act of 1979 (S 209), 125 Cong. Rec. S 557 (January 24, 1979). That amendment, which was sponsored in 1978 and 1979 by Senators Javits and Williams, would operate *prospectively* only.

15. Appellants and petitioners are wrong in asserting that ERISA Section 206(b) and IRC Section 401(a)(15) affirmatively and specifically authorize certain statutory benefit integration. Those provisions only codify a specific, existing restriction on this comprehensive and intricate pension area which had developed under the antidiscrimination rules of pre-ERISA tax law.

amount which the parties agreed would be paid under these particular private plans. ERISA Section 203(a) and IRC Section 411(a) operate only to establish the nonforfeitability of the claim. The vesting standards do not withdraw the authority to integrate with employer financed benefits provided under the workers' compensation program or any other statutory income program in defining plan benefits. Were this not the case, the specific restriction on integration codified in ERISA Section 206(b) and IRC Section 401(a)(15) would be superfluous.

ERISA separately addresses vesting and statutory benefit integration, and, while these two pension concepts come together to produce the private plan benefit, they do not overlap or conflict. Only the income amount determined under the plan is reduced; the claim to the integrated benefit assured by the private plan is not forfeited.

B. Congress did not Change the Pre-ERISA Rules on Statutory Benefit Integration Which Approved Workers' Compensation Integration.

Integration with the workers' compensation program in defining private plan benefits was approved by the Internal Revenue Service prior to ERISA. Nowhere in the statute or its legislative history did Congress revoke that approval.[16]

Congress did not act without a frame of reference. During its lengthy consideration of ERISA, Congress focused on what was already there; it meticulously studied the development of the private retirement system under

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16. In addition, in that pre-ERISA statutory scheme, integration with workers' compensation did not extinguish a participant's nonforfeitable retirement claim. See pages 28-29, *post*.

pre-ERISA tax law.[17] Particularly in the areas of vesting and statutory benefit integration, the existing tax rules served as the predicate upon which Congress added the new restrictions of ERISA.

For example, in House Report 93-807, 93d Cong., 2d Sess., 8 (1974), II Leg. Hist. 3115, 3128, accompanying H. R. 12855, which in the vesting and statutory benefit integration areas is almost identical to the structure and language of ERISA as finally enacted (see II Leg. Hist. 2924, 2934, 3003-04), the Ways and Means Committee stated:

> Essentially, your committee's bill represents a significant improvement in the tax treatment now applicable with respect to qualified retirement plans. Your committee regards the present legislation as part of an evolutionary process which keeps this basic framework but which builds on it new provisions which experience indicates are necessary for the proper functioning of these plans.

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17. See, *e.g.*, S. Rep. 93-127, 93d Cong., 1st Sess., 11 (1973), I Leg. Hist. 587, 597:

> The Subcommittee on Labor, pursuant to Senate Resolution 235, 92nd Congress, March 6, 1972, and prior resolutions from the 91st Congress, has conducted a comprehensive and exhaustive study of the private pension plan system in the United States, with particular emphasis upon the impact which such plans have upon the workers covered. The Subcommittee's implementation of the Senate resolutions has been a methodical collection and analysis of vital statistics and pertinent detailed data from individual and group cases reflecting the internal administration and operations of private pension and welfare plans. Invaluable data was furnished by 1,493 selected pension plans in response to a comprehensive questionnaire prepared by the Subcommittee in the spring of 1970.

We note in this regard that many of this country's largest pension plans (*e.g.*, the General Motors plan, the Steelworker plans, the Raybestos plan) have included a workers' compensation offset in defining plan benefits.

Prior to the enactment of ERISA, the antidiscrimination rules of tax law comprised the major component for qualification of private retirement plans for favorable tax treatment. IRC Section 401(a) provided then, and continues to provide now in substantially identical form:[18]

> *Requirements for Qualification.*—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section —
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> • • •
>
> (4) if the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, . . . or highly compensated employees.
>
> (5) A classification shall *not* be considered discriminatory within the meaning of paragraph (3)(B) or (4) merely because . . . the . . . benefits . . . differ

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18. IRC Section 401(a)(5) was reenacted by Congress as part of ERISA with two changes, neither of which is pertinent here: *first*, a technical change, striking the phrase "paragraph (3)(B) or (4)" and inserting in lieu thereof "paragraph 4 or section 410(b) (without regard to paragraph (1)(A) thereof)," see ERISA Section 1016(a)(2)(B), III Leg. Hist. 4936; *and second*, a substantive change, adding to the end of IRC Section 401(a)(5) requirements for determining compliance with the antidiscrimination rules by "two or more plans of an employer . . . considered as a single plan," see ERISA Section 1012(b), III Leg. Hist. 4920.

Congress did not state or otherwise evidence that, upon such reenactment, it meant to have IRC Section 401(a)(5) applied differently by the Internal Revenue Service than it had been applied over the 30 years since its original enactment. Congress indicated just the contrary. See pages 25-26, *post*.

because of any retirement benefits created under State or Federal law. . . . (Emphasis added.)

This requirement was added to the Internal Revenue Code in 1942 and represented the first time that a restriction had been imposed on tax qualified plans prohibiting discrimination in favor of officers, shareholders or highly compensated employees.[19] The "saving" language of IRC Section 401(a)(5) permitting qualified plans to determine benefits differently among participants "because of any retirement benefits created under State or Federal law" was included in order to continue to allow "plans that supplement the social security program to qualify" for favorable tax treatment. H. R. Rep. 2333, 77th Cong., 1st Sess. (1942), 1942-2 Cum. Bull. 372, 450.[20]

In 1943 the Treasury Department promulgated Treasury Reg. §19.165(a)(4)-1 (1939 Code), T.D. 5278, 1943 Cum. Bull. 484-85. That Regulation discussed qualified

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19. Section 162 of the Revenue Act of 1942, P.L. 753, 56 Stat. 798, amending Section 165(a) of the Internal Revenue Code of 1939, 26 U.S.C. §165(a) (later changed to Section 401(a) of the 1954 Code).

20. Also mentioned in that House Report is integration with the railroad retirement program in defining private plan income benefits (see the reference in that Report to the "Carriers Taxing Act of 1937", 50 Stat. 435, 26 U.S.C. §1500, *et seq.* (1939 Code), under which the age, disability and survivor income benefits of the railroad retirement program were funded). H.R. Rep. 2333, 77th Cong., 1st Sess. (1942), 1942-2 Cum. Bull. 372, 450. See also, S. Rep. 1631, 77th Cong., 2d Sess. (1942), 1942-2 Cum. Bull. 504, 606: "A new paragraph (5) has been inserted in order to mention in the law itself some of the acceptable provisions found in plans supplementary to the Social Security Act. . . . The acceptable provisions mentioned in the law are not intended to be exclusive. . . ."

Private plan integration with income benefits provided under the social security or railroad retirement program does not result in discrimination in favor of higher paid employees because all plan participants are entitled to the prescribed, employer financed income level assured by the private plan, whether entirely from private plan fund or in tandem from the plan fund and these other, statutory income sources.

plan integration under the new antidiscrimination provisions as follows:

> *Discrimination as to Contributions or Benefits.*—
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> • • •
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> A plan . . . in which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be considered discriminatory because of such . . . difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 165(a).

The integrated retirement system saved from antidiscrimination includes income paid on account of disability. The system is geared to a wage-centered, industrial society and traditionally has provided income benefits to participants upon the occurrence of any one of three contingencies which actually, or presumptively, impair the normal flow of wages: reaching a stated age, incurring disability, or surviving the wage-earner. On the happening of one or more of these contingencies, the system responds predictably and a particular, defined level of periodic income is provided.

Thus, in the private sector, through use of tax incentives, Congress has fostered the growth of private employer sponsored retirement plans which provide periodic income benefits to participants who attain a certain stated age or who incur a disability, or to their survivors. These periodic income benefits may originate entirely from the fund of the private plan or, under the antidiscrimination rules, be defined and paid from the private plan fund in tandem with income benefits from other employer financed sources.[21]

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21. See Treasury Reg. §1.401-1(b)(1)(i), 26 C.F.R. §1.401-1(b)(1)(i), which specifically authorizes tax qualified retirement plans to provide income benefits based on age, disability or survivorship. Notably, the first employer plans in this country provided periodic income benefits solely on the basis of disability. Only later did private plans begin also to provide periodic benefits based on age. *See generally* Lubove, The Struggle for Social Security, 10-18 (Harv. Univ. Press 1968).

The most recognized statutory income support program for wage-earners is that existing under Title II of the Social Security Act ("Federal Old-Age, Survivors, and Disability Insurance Benefits"), 42 U.S.C. §401, *et seq.* This comprehensive national retirement program, as its title suggests, similarly provides income benefits (commonly referred to as "OASDI benefits") when covered workers reach a stated age or become disabled, or to their survivors or dependents. The formula for determining benefits under Title II is the same for benefits based on disability as for benefits based on age. The income level is determined by applying the statutory benefit formula to the average wages of the individual over a period of years, and, unlike welfare assistance, the income benefits are paid without proof of need.

The railroad retirement program (as enacted in 1935 and amended by the Railroad Retirement Act of 1937, and as amended by the Railroad Retirement Act of 1974, P.L.93-445, 88 Stat. 1305, 45 U.S.C. §231, *et seq.*[22]) is also a comprehensive retirement program which provides income benefits to individuals who have reached various stated ages, or who in connection with their work have become disabled from their regular work, or who have become disabled from any regular work. 45 U.S.C. §231a (a)(1). See also the civil service retirement program at 5 U.S.C. §8331, *et seq.*

The unifying concept in these private and statutory programs is employer financed income maintenance, whether the particular contingency setting the benefits in motion is age, disability, or survivorship. Thus, under

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22. A major reason for restructuring the Railroad Retirement Act in 1974 was to eliminate the "windfall" which resulted where income benefits were paid under both the railroad retirement program and the social security program, based on credit under each program. See S. Rep. 93-1163, 93d Cong., 2d Sess. (1974), *reprinted in* 3 [1974] U.S. Code Cong. & Admin. News 5702, 5738. The elimination of this dual income benefit was recently approved by this Court in *United States Railroad Retirement Board v. Fritz*, 49 U.S.L.W. 4035 (December 9, 1980).

the social security or railroad retirement program, a worker might leave his job and satisfy the statutory test for benefits based on both age and disability. Notwithstanding the occurrence of both these contingencies, each individually qualifying that person for benefits, he is entitled only to one income benefit under the statutory program. Similarly, disability benefits under the social security and railroad retirement program terminate at age 65, not because Congess believed that no one over age 65 has incurred a disability requiring income support, but because the uniform benefits payable at age 65 thereafter provide the specified income. The same is true under private retirement plans. A private plan typically provides benefits based on age or disability. Although a participant might qualify for benefits on the basis of both age and disability, he receives one income benefit, the same as his counterpart who qualifies only for income benefits based on age. Dual benefits are not provided. The focus is on the income objective, not the cause of eligibility. As Dean Larson stated in describing the statutory income scheme, "[it] is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to three major causes of wage-loss: physical disability, economic unemployment, and old-age. The crucial operative fact is that of the wage loss; the cause of the wage loss merely dictates the category of legislation applicable."[23]

State workers' compensation is one additional branch of this employer financed, statutory income scheme. Work-

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23. 4 Larson, The Law of Workmen's Compensation §97.10, at 18-9 (1980 ed.).

This interplay of income benefits is similarly recognized by the Internal Revenue Service in its benefit integration rules which have traditionally permitted, for example, "offset" plans to integrate plan disability benefits with age benefits payable under the social security program. See, *e.g.*, Revenue Ruling 62-152, 1962-2 Cum. Bull. 126, 127 ("After normal retirement age, when old-age benefits under the Social Security Act become payable, the offset of disability benefits may be that provided by paragraph 8 of Revenue Ruling 61-75.").

ers' compensation programs provide economic security against the disability risk. The primary objective is to replace some determinable portion of income which actually or presumptively has been, or will be in the future, impaired by disability. Eligibility for these periodic income benefits is established by proof of a disability that is work-connected. Causation, scope of employment, and the employer's fault or blameworthiness are not at issue. Payments are entirely employer financed and universally computed based on a percentage, generally two-thirds, of the individual's pre-disability wages. In addition to these periodic income benefits, the workers' compensation program also provides "service" benefits. The employer generally is required to pay all medical expenses incurred by the individual in connection with the disability, and it has been estimated that payment of these medical expenses constitutes approximately one-third of the total outlay under the program. (Only the periodic income benefits paid during retirement, not the medical expenses, are integrated with the income benefits provided under the private plan.)[24]

The ERISA definition of "normal retirement benefit" also carries forward this interplay of income benefits. Normal retirement benefit is defined as the benefit payable under the plan at normal retirement age, whether characterized in the plan document as an "age" or "disability" income benefit. See ERISA Section 3(22), 29 U.S.C. §1002(22). (Appellants ignore this by quoting only portions of the normal retirement benefit definition, Appellants' Brief, 31.)

The federal government engages in this same offsetting of income benefits, regardless of triggering cause. For example, under the railroad retirement program, an individual's statutory "supplemental annuity" is reduced by the amount of any supplemental retirement income (whatever the cause of eligibility) that the individual also receives for that month under any other supplemental plan. 45 U.S.C. §231a(h)(2). Of course, the *claim* under the social security program is not forfeited by reason of this integration.

24. For a detailed analysis of the objectives of the workers' compensation program, *see generally* Compendium on Workmen's Compensation, National Commission on State Workmen's Compensation Laws, "Theories and Objectives of Workmen's Compensation", 21-26 (Gov. Printing Office 1973); Larson, *Basic Concepts and Objectives of Workmen's Com-*

In Revenue Ruling 68-243, 1968-1 Cum. Bull. 157, the Internal Revenue Service formally approved private plan integration with income benefits payable under the workers' compensation program. That Revenue Ruling provides that "benefits payable under a workmen's compensation law . . . are acceptable as an offset against benefits payable under [a] qualified pension plan" and that such offset does not cause a violation of the antidiscrimination rules.

Revenue Ruling 68-243 was later incorporated by the Internal Revenue Service in the comprehensive Guides for Qualification of Pension, Profit-Sharing and Stock Bonus Plans published in Revenue Ruling 69-421, 1969-2 Cum. Bull. 59. In Part 4 ("Requirements As To Coverage"), subpart (j) ("Integration") of those Plan Qualification Guides, the Internal Revenue Service stated:

> *Integration With Benefits Provided Under Other Public Programs—*
>
> Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. Thus, benefits payable under a state work-

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pensation, reprinted in I Supplemental Studies for the National Commission on State Workmen's Compensation, 31-39 (Gov. Printing Office 1973); Riesenfeld, *Forty Years of American Workmen's Compensation,* 35 Minn. L. Rev. 525 (1951). See also, chapter 1, volume 1 (1978 ed.) of Dean Larson's comprehensive treatise on this subject, The Law of Workmen's Compensation. *Cf. Katz v. Township of Howell,* 67 N.J. 51, 63, 355 A.2d 14, 20 (1975).

Congress itself continues to recognize workers' compensation as one aspect of the general income support scheme, requiring at 42 U.S.C. §424a that disability income benefits under the Social Security Act are to be reduced on account of the concurrent receipt of state workers' compensation benefits.

> men's compensation law . . . may be an acceptable offset against benefits payable under a qualified plan.

Id., 72.

This same approval of workers' compensation integration in determining private retirement income also was included by the Internal Revenue Service in its updated, February, 1972 publication of the Guides for Qualification of Pension, Profit-Sharing and Stock Bonus Plans, IRS Pub. 778 (2-72).[25]

In enacting ERISA, Congress first carefully studied the development of qualified plans under these antidiscrimination rules of the tax law. Indeed, it used the Guides for Plan Qualification in framing parts of the new legislation. See, *e.g.*, S. Rep. 93-383, 93d Cong., 1st Sess., 94 (1973), I Leg. Hist. 1069, 1162. Except where Congress specifically provided, the antidiscrimination rules were not changed by ERISA. The Conference Committee Report is precise:

> Under the conference substitute the rules of the House bill are adopted with respect to the relationship of the minimum vesting standards of the bill to the antidiscrimination rules of present law (sec. 401 (a)(4) of the Internal Revenue Code). In general, a plan which meets the vesting requirements provided in this substitute is not to be considered as discriminatory, insofar as its vesting provisions are concerned, unless there is a pattern of abuse under the plan (such as the firing of employees before their accrued benefits vest) or there has been (or there is reason to believe that there will be) an accrual of benefits or forfeitures tending to discriminate in favor of employees who are officers, shareholders or who are highly compensated.

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25. *Reprinted in* No. 351 BNA Tax Management Portfolio, B-1401, 1415.

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Moreover, the conferees intend that the antidiscrimination rules of present law are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. (Emphasis added.)[26]

Although Congress examined the benefit integration practices which had developed under the antidiscrimination rules, it enacted only the specific restriction on statutory benefit integration which is set forth in ERISA Section 206(b) and IRC Section 401(a)(15). Other than the codification of that existing restriction, approved statutory benefit integration survived. Congress deferred consideration of additional legislation in this area pending further study of the scheme.[27]

Existing case law also had approved workers' compensation integration in determining private retirement income. See, *e.g.*, *Renshaw v. United States Pipe & Foundry Co.*, 30 N.J. 458, 153 A.2d 673 (1959); *Parsons v. Granite City Steel Company*, 41 Ill. App. 2d 396, 190 N.E.2d 644 (1963).

26. Conf. Rep. 93-1280, 93d Cong., 2d Sess., 276-77 (1974), III Leg. Hist. 4277, 4543-44.

27. See Supplemental Views of Hon. James C. Corman and Hon. Sam Gibbons on H.R. 12855, H.R. Rep. 93-807, 93d Cong., 2d Sess., 168, 171-72 (1974), II Leg. Hist. 3288, 3291-92:

> The [House Ways and Means] committee did not take action on the thorny issue of "integration," but instead postponed further consideration of the problems of fairness which are involved until social security issues are taken up later in the year. It cannot be stressed too strongly that remedial action is needed in this area.
>
> • • •
>
> . . . [I]t is time that Congress stopped letting the Internal Revenue Service regulate "integration" and made a thorough investigation of the problem. We look forward to early action by the Ways and Means Committee on this.

Certainly, after the close study by Congress of the existing pension rules for qualified plans and its reenactment of IRC Section 401(a)(5) without relevant change, Congress' failure to invalidate workers' compensation integration is persuasive authority that this approved benefit integration remains permissible and not revoked in whole or in part by ERISA's general requirements on vesting. *Helvering v. Winmill,* 305 U.S. 79, 83 (1938).

Congress, however, was equally concerned with the cost impact on plans should integration with employer financed statutory benefits be prohibited. In discussing integration with the social security program, the House Ways and Means Committee noted that:

> [Y]our committee is very much aware that many present plans are fully or partly integrated [with the social security program] and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth [of] or perhaps even eliminated private retirement plans.
>
> In view of the serious issues involved in the integration of private plans with the social security system, your committee believes that it is desirable to postpone action on this issue pending further study of this problem.

H.R. Rep. 93-807, 93d Cong., 2d Sess., 69 (1974), II Leg. Hist. 3115, 3189. And because of this same concern with increased employer costs, Congress chose to delete from the bill initially reported by the Conference Committee a provision which would have temporarily restricted increases in the level of integration due to increases in social security benefit levels occurring after December 31, 1971 (see Section 1021(g) of the Conference Committee bill, III Leg. Hist. 4405-06). In explaining why that temporary freeze was removed from the Conference Committee bill (by H. Con. Res. 609, 93d Cong., 2d Sess., Section 17, (1974), III Leg. Hist. 4722, 4727), Senator Williams stated:

> We have been told that this [temporary freeze on integration] will greatly increase the costs of private pension plans, something that I am sure none of the Senators would like to see occur.

III Leg Hist. 4732.

Moreover, under pre-ERISA tax law, integration in defining private plan benefits was never considered to violate a participant's nonforfeitable pension right. The requirement that a pension claim be nonforfeitable upon the occurrence of certain events did not first arise in ERISA. Coexisting with the development of statutory benefit integration (including workers' compensation integration) under the antidiscrimination rules of IRC Section 401(a)(5) were the nonforfeitability requirements of IRC Section 401(a)(7). IRC Section 401(a)(7) was a statutory vesting requirement, enacted in 1962, which provided:

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, . . . are nonforfeitable.[28]

The language and structure of IRC Section 401(a)(7) obviously served as the model for the additional vesting rules of ERISA. The test for a "nonforfeitable" claim under IRC Section 401(a)(7) also was in substance the same as that under ERISA. A claim was treated as nonforfeitable only if "there [was] no contingency under the plan which [could] cause the employee to lose his rights" to the plan benefit. Treasury Reg. §1.402(b)-1(a)(2)(i), T.D. 6203, 1956-2 Cum. Bull. 245.[29] *Cf. Pollnow v. Commissioner of Internal Revenue,* 35 T.C. 715 (1961). Workers' compensation integration, however, never con-

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28. P.L. 87-792, 76 Stat. 809. IRC Section 401(a)(7) was reenacted under ERISA as IRC Section 411(d)(3), 26 U.S.C. §411(d)(3).

29. See Treasury Reg. §1.401-6(a)(1), T.D. 6675, 1963-2 Cum. Bull. 165.

flicted with the nonforfeitable rights requirement of IRC Section 401(a)(7). Integration and nonforfeitability were distinct and independently regulated pension concepts, one representing permissible, nondiscriminatory benefit formulation, the other referring to the vested quality of a participant's retirement claim. If, in enacting ERISA, Congress had intended to extend the reach of vesting to restrict such approved benefit integration, it would have said so.

C. Treasury Reg. §1.411(a)-4(a), Which was Promulgated after ERISA, Approves Workers' Compensation Integration in Determining Private Retirement Income.

The Third Circuit concluded below that private plan integration with income amounts paid to participants during retirement under the workers' compensation program did not violate ERISA's minimum vesting standards. In so holding, the court sustained as valid Treasury Reg. §1.411(a)-4(a), 26 C.F.R. §1.411(a)-4(a), T.D. 7501, 1977-2 Cum. Bull. 133, 144.

Treasury Reg. §1.411(a)-4(a) addresses the precise issue presented here: it states that in determining private retirement income under a plan, integration with benefits provided under state or federal law does not violate the vesting rules of ERISA. The Regulation provides:

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Treasury Reg. §1.411(a)-4(a) was promulgated by the Treasury Department pursuant to its statutory authority to implement the new vesting and other standards of

ERISA (see ERISA Sections 3001-04, 29 U.S.C. §§1201-04[30]) as well as under its explicit authority from Congress to promulgate "all needful rules and regulations for the enforcement" of the Internal Revenue Code, of which the minimum vesting and other pension standards are a part (see IRC Section 7805(a), 26 U.S.C. §7805(a)).

Treasury Reg. §1.411(a)-4(a) reflects the considerable expertise of the Treasury Department in this complex area[31] and harmonizes the intricate ERISA provisions. Whether labelled "legislative" (as the Third Circuit characterizes it) or otherwise, Treasury Regulation §1.411(a)-4(a) may not be invalidated unless the Court finds it to be plainly unreasonable or wholly inconsistent with the governing statute, which it is not. *Bingler v. Johnson,* 394 U.S. 741, 749-51 (1969); *United States v. Correll,* 389 U.S. 299, 305-07 (1967); *Helvering v. Winmill,* 305 U.S. 79, 83 (1938).

Congress has entrusted to the Treasury Department the administration of the federal pension laws. Both prior to ERISA, and at all times since the enactment of ERISA, the Treasury Department has affirmatively permitted qualified private plans to integrate with income benefits under

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30. With certain narrow exceptions (*e.g.*, what constitutes a "year of service"), Congress gave the Treasury Department exclusive authority to promulgate the minimum vesting regulations. These regulations apply equally to ERISA Section 203(a) and to IRC Section 411(a). See Conf. Rep. 93-1280, 93d Cong., 2d Sess., 359 (1974), III Leg. Hist. 4277, 4626 ("Under the conference substitute the Department of the Treasury is to prescribe the necessary regulations under the general provisions relating to participation, vesting, and funding except where specific authority is given to the Secretary of Labor to prescribe the regulations."). See also, Reorganization Plan No. 4 of 1978, *reprinted in* 7 [1978] U.S. Code Cong. & Admin. News 9790, 9814-18 ("Treasury will have statutory authority for minimum standards. The new plan puts all responsibility for funding, participation, and vesting of benefit rights in the Department of Treasury.").

31. See, *e.g.*, H.R. Rep. 93-807, 93d Cong., 2d Sess., 31 (1974), II Leg. Hist. 3115, 3151:

the workers' compensation program, and these integrated plans are financed on this basis.[32] To reject the statutory authorization of the Treasury Department in this area would unexpectedly, and substantially, increase the income amounts which the parties themselves decided would be paid under these private plans. Reasonable and bargained-for expectations, consistently approved by the regulatory agency responsible for day-to-day administration of these laws, would be forsaken.

Workers' compensation integration was approved under tax law prior to ERISA and nowhere in ERISA did Congress revoke that approval. Treasury Reg. §1.411(a)-4(a) carries forward that pre-ERISA approval and is a reasonable implementation of the statute.

> Your committee believes that primary reliance on the tax laws represents the best means for enforcing the new improved standards imposed by the bill. Historically, the substantive requirements regarding nondiscrimination, which are designed to insure that pension plans will benefit the rank and file of employees, have been enforced through the tax laws and administered by the Internal Revenue Service. . . .
>
> Your committee believes that the Internal Revenue Service has generally done an efficient job in administering the pension provisions of the Internal Revenue Code. The very extensive experience that the Service has acquired in its many years of dealing with these related pension matters will undoubtedly be of great assistance to it in administering the new requirements imposed by the committee bill.

32. Financing of defined benefit plans is determined on the basis of the retirement income defined to be paid under the particular plan (here, an integrated income level). It is not, as appellants and petitioners urge, determined on an individual-by-individual basis, with a certain percentage of each employee's weekly or monthly wages diverted to a pension fund for deferred payment. "Only in the most abstract sense may it be said that an employee 'exchanges' some portion of his labor for these possible benefits." *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979).

D. The Decision of the Sixth Circuit Ignores the Language of the Statute and its Antecedent History.

The Sixth Circuit, in a 2 to 1 decision (Judge Engel dissenting), reached a result on this same issue opposite from that of the Third Circuit. See *Utility Workers v. Consumers Power Company,* No. 78-1402 (January 6, 1981), *petition for rehearing en banc pending.* Judge Peck, writing the majority opinion in *Utility Workers,* ruled that ERISA's vesting standards must be expanded beyond the actual language of the statute to prohibit workers' compensation integration in determining private retirement income. He concluded that while integration with OASDI benefits under the social security program survived ERISA's vesting rules, integration with workers' compensation did not.

In arriving at this conclusion, Judge Peck failed to discern the critical statutory distinction between the retirement *right,* which under ERISA Section 203(a) and IRC Section 411(a) must vest upon satisfaction of certain stated requirements, and the income amount determined under the plan (here, an integrated income amount).

Judge Peck expressed concern that undue attention to the statutory language opened the floodgate to new plan formulations purposely designed to evade ERISA's vesting standards. That concern plainly is unwarranted here. Integration with employer financed, statutory income benefits has been an accepted, and tax regulated, part of private retirement plans for many years. Unlike the hypothetical plan provisions which concerned Judge Peck, and which apparently moved him to disregard the language of the statute, workers' compensation integration commonly existed in plans prior to ERISA. Revenue Ruling 68-243 formally approved workers' compensation integration under the antidiscrimination rules of IRC Section 401(a)(5) and that Revenue Ruling was twice republished during Congress' consideration of the early ERISA

bills. At the same time, IRC Section 401(a)(5) was reenacted as part of ERISA, without relevant change, and without a word from Congress that prevailing benefit integration approved under IRC Section 401(a)(5) was to be abruptly abandoned.

Under circumstances such as these "caution must temper judicial creativity." *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565 (1980). Although ignored by Judge Peck in *Utility Workers,* vesting and statutory benefit integration are two distinct pension concepts which do not conflict under ERISA. By establishing minimum standards as to when an employee's claim must vest, Congress did not thereby withdraw from plans the approval to integrate with income amounts paid during retirement under the workers' compensation program. The Third Circuit's decision below recognized this basic distinction as well as the antecedent history of workers' compensation integration; the majority decision of the Sixth Circuit in *Utility Workers* did not. The plan benefit here is an integrated benefit, and the claim to that integrated benefit assured by the private plan is not forfeited.

II. NEW JERSEY MAY NOT REGULATE THE TERMS AND CONDITIONS OF PRIVATE RETIREMENT PLANS COVERED BY ERISA.

The Third Circuit correctly stated in its opinion below that insofar as N.J. Stat. 34:15-29, as amended by Chapter 156 of the New Jersey Laws of 1977 ("Chapter 156"), prohibits private retirement plans covered by ERISA from integrating with income benefits provided under the workers' compensation program, the state statute is preempted by ERISA.

Chapter 156 provides:

> The right of [workers'] compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

Appellants and petitioners assert that Chapter 156, which is part of New Jersey's Workers Compensation Law, was enacted under the state's broad police power, and that it is not concerned with pension plans *qua* pension plans but merely with workers' compensation benefits. Under these circumstances, they assert, Chapter 156 must be allowed to stand absent clear congressional intent to preempt.

Admittedly, the federal/state regulatory balance may not be disturbed unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). It is equally clear, however, that "when Congress has 'unmistakenly . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* ERISA, the federal statute involved here, in clear language mandates that federal law shall supersede any and all state laws that relate to private pension plans.

Again, the starting point is the language of the statute itself. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). ERISA Section 514(a), 29 U.S.C. §1144(a),[33] provides with certain specifically enumerated exceptions, none of which are applicable here,[34] that state laws are superseded not only where such

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33. The full text of ERISA Section 514 is set forth at pages 5a-6a of the Appendix to this Brief, *post*.

34. ERISA preemption is limited only by ERISA Section 514(b)(2)(A), 29 U.S.C. §1144(b)(2)(A), which permits state regulation of insurance, banking and securities; by ERISA Section 514(b)(4),

laws directly regulate the terms and conditions of employee benefit plans but

> insofar as they may now or hereafter *relate to* any employee benefit plan. . . . (Emphasis added.)

This preemption language is shaped further by the manner in which Congress defined the terms "State law" and "State". ERISA Section 514(c), 29 U.S.C. §1144(c), provides:

> For purposes of this section:
>
> (1) The term "State law" includes *all* laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.* (Emphasis added.)

Congress carefully chose this broad preemption language and intended preemption of state law to be as expansive as the language of ERISA Section 514 dictates.[35]

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29 U.S.C. §1144(b)(4), which permits application of a state's general criminal laws; and by ERISA Section 514(d), 29 U.S.C. §1144(d), which is a savings clause for other federal statutes, rules and regulations. Appellants and petitioners do not assert that any enumerated exception to ERISA preemption applies here.

35. As the Third Circuit noted below, the legislative history of ERISA Section 514 has been exhaustively analyzed and discussed by the courts, *see, e.g., Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977),

ERISA Section 514 was drafted by the Conference Committee and is more sweeping than the preemption provision contained in either the House or Senate bills. The version of the bill sent by the Senate to the Conference Committee, H.R. 2, Section 699, 93d Cong., 2d Sess., 573-75 (March 4, 1974), would have preempted state laws to the extent that such laws related to the "subject matters" regulated by that bill or by the Welfare and Pension Plans Disclosure Act. See III Leg. Hist. 3599, 3820-22. The version of the bill passed by the House, H.R. 2, Section 514, 93d Cong., 2d Sess., 160-62 (February 28, 1974), actually enumerated the specific areas to be preempted by federal law: reporting and disclosure, fiduciary responsibilities, nonforfeitability, funding, portability and plan termination insurance. See III Leg. Hist. 3898, 4057-59.[36]

These preemption provisions were rejected and Congress chose instead to apply preemption in its broadest and

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cert. denied, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-17 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D.Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978), and fully supports the Third Circuit's application of the preemption clause here.

36. The Nixon Administration submitted a third preemption clause to the House and Senate conferees on H.R. 2. See III Leg. Hist. 5047, 5145-47. The Administration's proposal also specifically listed the precise areas of state law to be preempted and was intended to tighten the bill's preemption clause. In recommending enactment of its proposal, the Administration explained that:

> The preemption provisions under the House bill are extremely vague, while the Senate bill is too broad since it preempts all state laws covering areas regulated under the Act, which includes tax aspects of retirement plans. Accordingly, the Administration has submitted clarifying language.

III Leg. Hist. 5146.

most comprehensive sense. The Conference Committee Report provides:

> *Preemption of State Laws (Sec. 514 of the bill)*
>
> Under the substitute, the provisions of title I are to supersede *all* State laws that *relate to* any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce.

Conf. Rep. 93-1280, 93d Cong., 2d Sess., 383, III Leg. Hist. 4277, 4650 (emphasis added).

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, in presenting the Conference Committee bill to the Senate, explained the broad preemption of state law under the statute as follows:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

III Leg. Hist. 4745-46. Also speaking on behalf of the Conference Committee bill, Senator Javits similarly explained what was intended by this reinforced preemption clause:

> Both House and Senate bills provided for preemption of State law, but — with one major exception appearing in the House bill — defined the perimeters of preemption in relation to the areas regulated by

> the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation — at either the State or Federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of State action in the field of private employee benefit programs. The conferees — recognizing the dimensions of such a policy — also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

III Leg. Hist. 4770-71. Finally, Representative Dent, another of the major sponsors of ERISA, also emphasized the broad scope of ERISA's preemption provision in his statement to the House in support of the Conference Committee bill:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . .

> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof — including any professional society or association operating under code of law — which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

III Leg. Hist. 4670-71.

The state law at issue here, Chapter 156, not only relates to employee benefit plans but directly regulates the method by which private plans determine private retirement income: it specifically prohibits private pension plans from integrating with any income amounts the participant also is paid during retirement under the workers' compensation program. Moreover, by regulating the determination of retirement income under these private plans, Chapter 156 also regulates the financing of the plan by the plan sponsor. If Chapter 156 is allowed to stand, not only will private plans be required to exceed the income levels decided upon by the parties and stated in the plan document, but also the plan sponsor will be required to incur the cost of this substantially increased income to be paid under the private plan. This obviously is a matter for Congress, not New Jersey, to weigh.

In finding this state statute preempted by ERISA, the Third Circuit correctly concluded below that:

> Our reading of ERISA satisfies us that ERISA *does* preempt N.J. Stat. §34:15-29 (Supp. 1979). Thus, we cannot agree with the district courts that have concluded otherwise. The primary purpose of the statute,

> and its direct effect, is to prohibit pension plans from offsetting Workmen's Compensation benefits against pension retirement benefits. It simply cannot be said that this statute does not concern pension plans *qua* pension plans . . . , or that its effect on such plans is merely collateral. . . . In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans. . . .

Joint Appendix of Petitioners and Respondent, 116a.

The fact that Chapter 156 is structured as part of the New Jersey Workers' Compensation Law is of no import in concluding that the state statute "relates to" employee benefit plans within the meaning of ERISA Section 514(a). ERISA explicitly preempts *any and all* state laws which *directly or indirectly* relate to private employee benefit plans (although it specifically saves from preemption, for example, a state's generally applicable criminal laws, ERISA Section 514(b)(4), 29 U.S.C. §1144(b)(4)). It is not the label given a statute but its effect which governs, and Chapter 156 is specific legislation the effect of which is to regulate how private plans determine private retirement income. It therefore "relates to" these employee benefit plans within the meaning of ERISA Section 514(a) and is preempted.

CONCLUSION

For all of the reasons set forth above, appellees Raybestos-Manhattan, Inc. and the Raybestos-Manhattan, Inc. Employee Retirement Plan respectfully submit that the decision of the Third Circuit below should be affirmed in all respects.

Respectfully submitted,

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APPENDIX

ERISA SECTION 203(a)

ERISA Section 203(a) ("Minimum vesting standards") provides as follows:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.
>
> (B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60

Appendix

Years of service:	Nonforfeitable percentage
12	70
13	80
14	90
15 or more	100

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

Appendix

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 205).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 302(c)(8).

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit de-

rived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 204(c)(2)(C)) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 204(c)(2)(C) (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before the date of the enactment of this Act, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before the date of the enactment of this Act, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after the date of the enactment of this Act. The Secretary of the

Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

ERISA SECTION 514

ERISA Section 514 ("Other laws") provides as follows:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(a) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance

companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

No. 79-1943

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Supreme Court of the United States

OCTOBER TERM, 1980

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Appellants,

vs.

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Appellees,

STATE OF NEW JERSEY,

Intevenor.

ON APPEAL FROM THE FINAL ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF APPELLANTS

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Appellants,

vs.

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Appellees,

STATE OF NEW JERSEY,

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REPLY BRIEF OF APPELLANTS

INTRODUCTION/SUMMARY OF ARGUMENT

> " '[T]o hold that any forfeiture or suspension of benefits is permissible so long as it is sanctioned by the [pension] plan is to turn [ERISA's] entire statutory scheme upon its head.' " . . . If this Court were to accept the reasoning of defendants, a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures. Such result, however, would be contrary both to the provisions and to the spirit of ERISA." *Utility Workers Union of America* v. *Consumers Power Co.*, —F.2d—, No. 78-1402 (6th Cir. Jan. 6, 1981), petition for reh. en banc den. Feb. 13, 1981.

Invoking "integration" as a talisman to conceal the reality of an employee's permanent loss of all or a part of his pension benefits;

Inferring from Congress' agonizing, temporary approval of limited Social Security integration, a clear intent to sanction all other practices causing the loss of part or all of a participant's pension benefits;

Conceding a "right" and a "claim" to which no "benefit" is attached — despite respondent's acknowledgment (Brief, 13) that "obviously, the 'claim' cannot exist without the 'benefit' ";

Relying on a "legislative regulation" analysis which was central to the decision below but which is now repudiated by its intended beneficiary;

Disregarding the missing ingredient of that regulation which the Sixth Circuit has ruled is necessary, i.e., the correlation of like "*retirement*" benefits;

And making arguments which prove altogether too much under both the tax code and ERISA,

Appellees, respondent and their *amici*, despite seven briefs totalling 208 pages, have failed utterly to meet the central argument of appellants and petitioners — that the clear language, history and purpose of ERISA plainly prohibit the loss of an employee's rights to his vested retirement benefits under any circumstance, except those specifically permitted in the Act.

What these briefs demonstrate clearly is defendants' serene but erroneous perception of ERISA as but another amendment to the tax code: that except for a limited list of explicit changes in the substantive law, Congress, on enacting the Pension Reform Act "intended that pre-ERISA practices would continue in effect"[1] in all other areas.

As we presently demonstrate, however, defendants may not rely on semantic incantations and the pre-ERISA *status quo* to legitimize abuses plainly and directly forbidden by ERISA, a statute which *amicus* United States otherwise acknowledges "announces a fundamental principle of nonforfeiture of pension benefits." (Brief, 13).

As we further show *infra*, part II, defendants and their *amici* have in their broad preemption arguments simply ignored the clear exception from the coverage of ERISA in §4(b)(3) for plans maintained to comply with "applicable workmen's compensation laws." As courts recently considering the issue have concluded, if a law relating to a plan maintained to comply with a workmen's compensation law is not preempted by ERISA, §514(a), then *a fortiori*, the workmen's compensation law itself cannot be preempted.[2]

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[1]Brief of *amicus* U.S. Chamber of Commerce, p. 11.

[2]Appellees (Brief, p. 6, n. 4) and respondent (Brief, p. 6, n. 1) assert, without citing the relevance thereof, that §203(a) is inapplicable to forfeitures occurring after its effective date to individuals retiring prior thereto. No issue in that regard in these removed cases was asserted below by appellee Raybestos; nor is it relevant as to respondent General Motors, where petitioners are a certified class including both persons who retired before and after such effective date. Order of August 9, 1978, J.A. 52a. In any event, authority recognizes the application of §203(a) to pre-ERISA retirees as to post-effective-date benefits, in analogous circumstances (here, a post-effective date suspension-forfeiture of otherwise undisputed benefits). *Riley* v. *MEBA Pension Trust*, 570 F. 2d 406 (2d Cir. 1977) (post-ERISA "suspension" of benefits on account of pre-ERISA retiree's reemployment outside of "industry"; held prohibited by §203(a)(3)(B)); *Bonar* v. *Barnett Bank of Jacksonville*, 488 F. Supp. 365 (M.D. Fla. 1980) (post-effective-date "suspension" of benefits on account of pre-ERISA retiree's violation of non-competition clause; held prohibited by §203(a). Reasoning of *Fremont* v. *McGraw-Edison Co.*, 606 F. 2d 752 (7th Cir. 1979), expressly rejected, and other authorities approved, 488 F. Supp. 370, n. 7). That construction accords with the

I.
THE ARGUMENT OF APPELLEES, RESPONDENT AND THEIR *AMICI CURIAE* WITH REGARD TO ERISA §203(a) ARE WITHOUT MERIT.

A. Defendants' asserted distinction between "claim" and benefit," and its "under the plan" argument contravene the clear language, history and purposes of ERISA.

Relying heavily on the Court's statement in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 372-373, 64 LEd. 2d 354 (1980), that the phrase "nonforfeitable" may be viewed as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect," defendants argue that, in consequence, no forfeiture can occur whenever the "limit on the amount" of the benefit collected is provided for in the plan itself. (Brief of respondent, 13; Brief of appellees, 10-11). Defendants urge that while it is unlawful to cancel a participant's claim to his pension, it is perfectly lawful to cancel the entire benefit to which his claim attaches.

However, entirely unlike the instant case, the limit on the collectible amount in *Nachman* arose not from any provision of the plan, which remained fully liable to pay all vested benefits, but from insufficiency of the plan assets — the routine uncollectibility situation. As respondent acknowledges (Brief, 13), "the 'limit' on the benefit amount receivable . . . in *Nachman* was the limit imposed by the adequacy of plan assets," as distin-

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statutory language of §211(b)(2), 29 U.S.C. 1061(b)(2), which provides for the application of §203(a) to *plan years* beginning after December 31, 1975. (The reliance by the District Court in *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation*, Civ. No. 79-73728 (E.D. Mich. 1980) (Appendix to Brief of Respondent, 16a), on purported legislative history to the contrary, is misplaced; the District Court erroneously cited legislative history to proposed S. 4, rather than later-adopted H.R. 2, whose conference report focused on the effective date of the *plan year* rather than the date of the employee's separation. H.R. Conf. Rept. 93-1280, [1974] U.S. Code Cong. & Admin. News 5038, 5048-5049.) Finally, and in any event, to the extent that pre-ERISA claims are not covered by the Act, they are expressly exempted from preemption by §§514(a) and (b), 29 U.S.C. §1144(a) and (b).

guished from the plan itself.[3] Here, however, the vested benefits of plaintiff pensioners are fully collectible, but for the plan provision conditioning receipt of such benefits upon forgoing receipt of worker's compensation for their on-the-job injuries.

Defendants' reasoning would make the comprehensive "Pension Reform Act" a cruel illusion. Rather than "assure that workers now covered by pension plans get their respective benefits"[4] and make "sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — that he actually receive it,"[5] ERISA would become a guarantee of nothing. Any and all forms of benefit losses could become sanctioned "under the plan." And whether denominated "integration," "offset," or "forfeiture," the reality for the pensioner would be precisely the same: he would not receive an expected pension benefit, which he had earned with his long years of service, for which he had forgone current compensation during his work career, and which had long since "vested" and become "nonforfeitable."

Indeed, a whole host of forfeitures would be legitimized by defendants' analysis, including "offsets" for savings from an employee's bank account, or for interest on his investments, or against other collateral earnings. Worst yet, the benefits derived from an employee's *own* contributions could be "offset" against worker's compensation without their being "forfeited." As the Sixth Circuit stated, the argument "proves too much."

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[3]Indeed, four of the justices believed even this provision placed a condition on plan benefits which would have become void upon the effective date of the minimum vesting standards. *Id*, at 69 L. Ed. 2d 354-355, n. 8.

[4]H.R. Rept. 93-533 (Education and Labor Committee), Supplemental Views of Reps. Quie, Ashbrook, Edenborn, Eshelman, and Hausen, reprinted in [1974] U.S. Code Cong. & Adm. News at 4639, 4666.

[5]*Nachman* v. *Pension Benefit Guaranty Corp*, *supra*, 100 S. Ct. at 1733. The Sixth Circuit in *Utility Workers* stated: "In the Act, Congress intended to provide these employees with guarantees that, after they had completed certain required years of service, they would gain unconditional and non-forfeitable rights to fixed pension benefits." (Slip Op., 9).

Utility Workers Union, supra, Slip. Op., 7. [6]

Congress was concerned about this very problem, of insuring that vesting provided a meaningful benefit. The House Ways and means Committee twice stated:

> "*Accrued benefits* — Under the committee bill, the vested employee is protected in his rights to all, or a certain percentage, of his 'accrued benefit.' It is necessary to provide a statutory definition of an 'accrued benefit' because, unless this is a defined amount, vesting of an 'accrued benefit' in whatever form is specified by the plan has little, if any, meaning."[7]

Congress responded to these concerns — apart from the vesting and antiforfeiture requirements — by providing a *statutory* definition of the "accrued benefit," ERISA §3(23). Thus, Congress clearly did regulate the benefit amount which would vest under §203(a).

Accrued benefits are determinable at *any* time, and the Act provides mechanisms for informing employees as to the precise amount of accrued and nonforfeitable pension benefits to which they are entitled at any given time. ERISA §§105 and 209(a). Plainly, any reduction of this amount, once vested and nonforfeitable, frustrates the very purpose of the Act to define an amount (including Social Security integration) which a participant can justifiably expect to receive upon retirement and to plan accordingly.

Moreover, as the Sixth Circuit noted in *Utility Workers,* under §3(19), the nonforfeitable claim is to "that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.*" Slip Op., 18 (Emphasis in original). It is this service-based benefit — as distin-

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[6]The Sixth Circuit decision in *Utility Workers,* of course, overrules every case relied on by defendants except the Third Circuit's here, including *Bordine, Pavlovic, Dotson,* and *Carlson* (*already* previously overruled).

[7]Rep. No. 93-807, 93rd Cong. 3d Sess, at 60, II Leg. Hist. at 3180, and Rep. No. 93-779, 93d Cong. 2d Sess, at 59, II Leg. Hist. at 2648. Similarly see Remarks of Sen. Williams, III Legislative History of the Employee Retirement Income Security Act of 1974 (hereafter, "Leg. Hist.") at 4736; and Rep. Perkins (House Education and Labor Committee), II Leg. Hist. 3293, 3328.

guished from the various "ancillary benefits" not part of the "normal retirement" or "accrued" benefit — which cannot be diminished upon vesting or attainment of normal retirement age.

Equally fundamental, fulfillment of the claim to these benefits must be "unconditional" (§3(19)). Forebearance of worker's compensation clearly conditions the receipt of the pension benefits here.[8]

Respondent concedes (Brief, 14) that §203(a) of ERISA prohibits the loss of pension benefits by operation of a plan "bad boy" provision, citing *Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008, (N.D. Ohio, 1976). In the same breath, however, it asserts that ERISA would sanction precisely the same result if a plan simply suspended monthly pension payments during the period the employee worked for the competitor — in the same fashion that it now suspends the entire benefit during plaintiffs' receipt of worker's compensation. This is so, defendants maintain, because now the forfeiture provision no longer cancels the participant's *claim* to his benefit (unlawful) but cancels the benefit itself (lawful). This is benefit "integration" (lawful), not benefit "loss" or "forfeiture" (unlawful).[9]

The fallacy of defendants' argument is graphically illustrated by ERISA §203(a)(3)(B), which provides an exception to the antiforfeiture requirement for *suspensions* of benefits during periods of re-employment with a narrowly-defined set of

[8]On this point, the District Judge in *Employee Benefits Committee* v. *Pascoe*, —— F. Supp. ——, No. 78-0483 (D. Hawaii, Dec. 15, 1980), quoting *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089 (E.D. Wis. 1979), appeal pending 7th Cir., No. 80-1755, held: "I think it would be an unreasonable interpretation of ERISA and contrary to its spirit to conclude that Congress injected another trade-off into this intricate scheme, forcing an employee with a work-related injury to forego the relief provided by statute for such injury in order to preserve his retirement benefits. Clearly, the nonforfeitability rule, with its narrowly defined and carefully delimited exceptions, was aimed at precluding such a harsh dilemma." (Slip Op., 13).

[9]The same "bad boy" clause could also operate to suspend or forfeit only a *portion* of an employee's vested benefit, see *infra*. 10, n.25, while still preserving his "claim" to the reduced amount — a situation defendants do not address.

employers. Only under the conditions enumerated therein is the suspension precluded from being deemed an impermissible forfeiture. *Riley* v. *MEBA Pension Trust*, 570 F. 2d 406 (2d Cir. 1977); Labor Department Regulation, 29 CFR §2530.230-3, filed January 26, 1981, reprinted at 326 BNA Pension Reporter, at R-26.[10] Yet under defendants' analysis, the sub-section is redundant or superfluous, for the same result could be obtained — as it was pre-ERISA — "under the plan."

In sum, defendants ask the Court, in the words of Judge Gordon in *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089, 1093 (E.D., Wisc 1979), "to conclude that, in the course of enacting a comprehensive remedial statute for the protection of the rights of workers to their earned retirement benefits, benefits which are essentially deferred compensation for services rendered, Congress left a gaping hole in its handiwork, allowing these benefits to be reduced proportionately when a retired worker successfully asserts a worker's compensation claim." As he and the Sixth Circuit concluded, it did not. *Accord*, *Employee benefits Comm.* v *Pasco*, No. 78-0483 (D. Hawaii, 1980)

B. The antidiscrimination provisions of the tax code do not sanction forfeitures under §203(a) of ERISA.

Defendants argue that worker's compensation offsets were permitted by the drafters of ERISA because the tax code antidiscrimination rules — which, defendants submit, properly permitted worker's compensation offsets[11] — "were not changed by ERISA." (Brief of appellees, 25).[12]

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[10]As Sen. Javits stated, the provision is a "limited exception to what is generally a rule precluding divestiture of vested benefits . . ." III Leg. Hist. at 4772.

[11]This assertion, for whatever it is worth, is glaringly incorrect, as we demonstrated in our initial brief, pp. 28-38.

[12]And see Brief of Respondent, 15-25; Brief of *Amicus* United States 20-22. Defendants cite absolutely nothing in the legislative history to evidence specific Congressional examination, or even awareness, of worker's compensation offset practices. Indeed, as defendants concede, only one of the four committees drafting ERISA even once made the most tenuous reference to any publication that mentioned such practices, but only "in an unrelated context" (Brief of respondent, 21, n. 30) — to explain its understanding of the then existing law of fiduciary responsibility and prohibited

(continued)

Defendants' citation of the Conference Committee Report[13] to the effect that existing antidiscrimination requirements were not changed by ERISA, is unavailing.[14] First, the Committee clearly states: "Moreover, the conferees intend that the antidiscrimination rules of present law in areas *other than the vesting schedule* are not to be changed." (Emphasis added). Thus, the ERISA-added requirements relating to the time at which an employee's pension benefits were to become nonforfeitable would apply even where antidiscrimination rules would require — not merely not prohibit (as here) — a different result.

Second and most fundamentally, *Congress plainly intended*[15] *that*, regardless of the continued status of existing antidiscrimination law, *the new vesting and nonforfeitability standards of ERISA and the Code were separate, new requirements which every pension plan would henceforth have to satisfy independently of, and in addition to, its obligations under the antidis-*

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transactions. S. Rep. No. 93-383, 93d Cong. 1st Sess., at 94 (1973), I Leg. Hist. at 1162. Significantly, Congress never cited IRS Publication 778, much less Rev. Rul. 68-243 and Rev. Rul. 69-421, to state its understanding of pre-ERISA antidiscrimination practices.

[13]Conf. Rep. 93-1280, 93rd Cong. 2d Sess, 276-77 (1974), III Leg. Hist. 4277, 4543-44.

[14]Brief of respondent, 21-22; Brief of *amicus* United States, 21-22; Brief of Appellees, 25-26 (pointedly omitting reference to the Conference Committee exception for "areas other than the vesting schedule").

[15]Thus, Rep. Ullman, one of the primary draftsman of ERISA, in describing the Conference Committee substitute bill, stated:

> "As under prior law, in order to qualify for this favorable tax treatment, pension plans will have to satisfy the present rules in the Internal Revenue Code designed to limit the favorable treatment to plans which do not discriminate in favor of highly paid employees as compared to the rank and file employees. However, under this legislation, to secure this favorable tax treatment, *plans will also have to satisfy additional requirements* which are designed to make them a more effective means of providing retirement income. *These new requirements* pertain to coverage, *vesting*, funding, fiduciary requirements, and plan termination insurance." (Emphasis added). III Leg. Hist. 4673.

See also, II Leg. Hist., 3324; III Leg. Hist. 3415; House Ways & Means Rep. No. 93-779, 93d Cong., 2d Sess, at 53 (1974), II Leg. Hist. at 2642; and Sen. Finance Committee Rep. No. 93-383, 93d Cong., 1st Sess., at 2, I Leg. Hist., at 1070.

crimination provisions of the Code.[16]

In the final analysis, defendants' antidiscrimination argument proves too much, because had all Code antidiscrimination rules been saved "with respect to coverage . . . contributions and benefits" to the *preemption* of vesting-antiforfeiture standards which might be higher in some instances, nothing would have changed, and a whole host of forfeitures not prohibited by the antidiscrimination provisions would still remain in effect. But, as defendants concede, this is simply untrue:

—Forfeitures for engaging in competitive employment, formerly permitted,[17] are prohibited by §203(a).[18]

—"Bad boy" forfeitures for any clearly stated cause, including misconduct, disloyalty, or dishonesty, formerly permitted,[19]

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[16]Indeed, even where the antidiscrimination provisions of the Code required a particular result which might conflict with the new vesting-antiforfeiture requirements, Congress was manifestly explicit in the few instances where it intended the antidiscrimination requirements to preempt the vesting-antiforfeiture standards. For example, existing antidiscrimination rules required that upon early plan termination, plan benefits were required to be distributed in such a manner as not to discriminate in favor of officers, shareholders, or highly compensated employees, even if this required a highly compensated employee to receive less than his otherwise vested plan benefit. To make clear that the receipt of less than the full vested benefit, where necessary to prevent discrimination, was not to be considered a forfeiture in violation of §203(a), Congress provided in ERISA §203(c)(2) and IRC §411(d)(2) that:

> "(2) Subsection (a) shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations presecribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1954."

Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess, at 277-278, reprinted in III Leg. Hist. at 4544-4545; House Ways and Means Comm. Rep. No. 93-779, 93d Cong., 2d Sess, at 63-64, reprinted at II Leg. Hist. 2652-2653; Sen Finance Com. Rep. No. 93-383, 93d, Cong, 1st Sess., at 50, reprinted in I Leg. Hist. at 1118.

[17]IRS Pub. 778, Part 5, P-H pension and Profit Sharing ¶107,000. *The Rochester Corporation* v. *Rochester*, 450 F. 2d 118 (4th Cir. 1971); *Swift* v. *Shop Rite Food Stores, Inc.*, 489 P. 2d 881 (N.M. S. Ct. 1971).

[18]E.g., *Keller* v. *Graphic Systems of Akron*, 422 F. Supp. 1005, 1008 (N.D. Ohio, 1976); IRC Reg. 1.411(a)-4(c), Example 1, 26 CFR 1.411(a)-4(c).

[19]Rev. Rul. 71-92, IRB 71-7, P-H Pension and Profit Sharing ¶65,744; IRS Pub 778, Part 5, P-H Pension and Profit Sharing ¶107,070.

are now prohibited.[20]

—Forfeitures for the inability to locate an employee, formerly permitted,[21] are plainly prohibited by §203(a).[22]

—Forfeitures, or discontinuance, of benefits during any period of post-retirement employment which causes suspension of primary insurance Social Security benefits, formerly permitted,[23] are now clearly prohibited unless falling within the exceptions created by §203(a)(3)(B).[24] See *supra*, at 6-7.

— Signficantly, what defendants would term "benefit adjustments," rather than "cancellation of a participant's claim," for all the foregoing causes, were also formerly permitted,[25] and are now plainly prohibited, see *supra*. Yet defendants' rationale requires them to argue that these latter benefit reductions for misconduct, disloyalty, or competing are not prohibited by §203(a) because the "claim" to the reduced benefit is still retained.

In sum, the propriety of permitting worker's compensation offsets under the Code's antidiscrimination rules is irrelevant to the question before the Court, since these and the new vesting-antiforfeiture rules were both, except as expressly provided otherwise by Congress, to exist fully in their respective spheres, and for very different purposes — the one, to protect Treasury revenues; the other to protect employee retirement

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[20]*Winer* v. *Edison Brothers Pension Plan*, 593 F. 2d 307 (8th Cir. 1979); *Amory* v. *Boyden Associates*, 434 F. Supp. 671 (S.D. N.Y. 1976); *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith*, 431 F. Supp. 271 (E.D. Pa 1977); *Fremont* v. *McGraw Edison Co.*, 606 F. 2d 752 (7th Cir. 1979).

[21]Rev. Rul. 70-317, IRB 1970-25, P-H Pension and Profit Sharing ¶65,680

[22]Ways and Means Com. Rep. No. 93-807, 93d Cong, 2d Sess., at 60, reprinted in II Leg. Hist. at 3180; Finance Committee Rep. No. 93-383, 93d Cong., 1st Sess., at 50, reprinted in I Leg. Hist. at 1118.

[23]IRS Pub. 778, Part 5, P-H Pension and Profit Sharing ¶107,070, Rev. Rul. 82, C.B. 1953-1, 288.

[24]*Riley* v. *M.E.B.A. Pension Trust*, 570 F. 2d 406 (2d Cir. 1977).

[25]"Similarly, provision may be made for granting less liberal rights under such circumstances." Rev. Rul 71-92, IRB 71-7, P-H Pension and Profit Sharing ¶65,745; IRS Pub. 778, Part 5, P-H Pension and Profit Sharing ¶107,070.

benefits.[26]

C. Treasury Regulation §1.411(a)-4(a) is unavailing to defendants.

In our initial brief we demonstrated that Treasury Regulation §1.411(a)-4(a) (1977), on which defendants rely, was neither a "legislative regulation" nor one which permitted non-retirement-benefit offsets. Treasury has itself now agreed with the former proposition (U.S. Brief, p. 19, n. 12); and the Sixth Circuit, with the latter.

Particularly in view of Treasury's own renunciation of the deference which defendants would accord its regulation, the regulation must be addressed in terms of its consistency with the statute it interprets. On this basis its purported authorization of benefit reductions "to take into account benefits which are provided under the Social Security Act or under any other Federal or State law," in Regulations §1-401-4(b) and §1.411-4(a) (1977), cannot authorize pension plan benefit reductions for workers' compensation.

Respondent and appellees argue that since Congress made no relevant change in Code §401(a)(5)—under which Rev. Rul. 68-243 was issued — then that section, including the holding of the revenue ruling, was "re-enacted by Congress."

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[26]Pre-ERISA IRS enforcement of employee benefit plan laws was not for the purpose of protecting employees, but rather to protect the Federal Government against unjustified revenue losses. Thus the Sen. Committee on Labor and Public Welfare, Rep. No. 1440, reprinted at [1958] U.S. Code Cong. & Adm. News at 4137, 4151, in connection with what became the Welfare and Pension Plans Disclosure Act, stated:

> "The regulation of qualified pension plans by the Internal Revenue Service is for income-tax purposes. It does not assure against abuse nor is there any disclosure to the employee-beneficiaries. On the contrary, by law the Internal Revenue Service cannot inform the beneficiary if it finds something wrong with the management of the plan. It can only disqualify the plan which operates to the detriment of the employee-beneficiaries. Under Internal Revenue Code enforcement, abuses or misconduct on the part of the employer-sponsor of the trust can victimize the employee-beneficiary."

Thus, IRS concern was never about pension benefit forfeitures as such, but only whether such benefit reductions tended to discriminate in favor of officers, shareholders and highly compensated employees. Rev. Rul. 70-317, IRB 1970-25, *supra;* Rev. Rul. 71-92, IRB 1971-7, *supra.*

First, as discussed above, Congress added an entire array of new vesting-antiforfeiture standards which plans would thereafter be required to *separately* meet.

Second, the Social Security integration authorized by §401(a)(5) *was* changed, to limit such integration, after the most tortured agonizing by Congress.[27] ERISA §206(b) and IRC §401(a)(15). To infer from this limited, temporary and specific "approval" of Social Security, as defendants claim, that Congress intended to give free rein to every other form of abuse causing reduction or loss of pension benefits is absurd.

Congress, however, was not "silent" about these other forfeiture provisions: all were loudly and clearly prohibited under §203(a). Concurrent with this new prohibition, Congress found it appropriate to place Social Security (and Railroad Retirement) "integration" in ERISA Title II by adding §206(b)[28] to ERISA, providing explicitly for limited Social Security and Railroad Retirement[29] integration. Indeed, if Social Security and similar integration were solely a matter of discrimination, Con-

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[27]Many legislators opposed Social Security integration, arguing that "lower and middle level workers . . . are in effect eliminated from the private plan" system. See, e.g., House Ways and Means Rep. No. 93-533, reprinted in [1974] U.S. Code, Cong. & Adm. News, *supra*, at 4835-4837 (Supplemental Views of Reps. Gorman and Gibbons); House Ways and Mean Rep. No. 93-807, 93d Cong., 2d Sess, at 69, II Leg. Hist. 3189; II Leg. hist. at 3429-3430 (Rep. Ullman); III Leg. Hist. at 4732 (Sen. Williams).

[28]Contrary to its characterization by defendants as a "benefit" (as distinguished from "vesting"), section §206 of ERISA contains another express exception, in subsection (c), to the nonforfeiture rule of §203(a). This further confirms the artificiality of the distinction which, defendants (but not Congress) seek to make between "claim" and "benefit."

[29]Railroad Retirement Act integration exemplifies defendants' dilemma. Such integration had been permitted administratively by IRS under §401(a)(5) since 1953 as a "retirement benefit created under State or Federal Law." Rev. Rul 61-147. However, Congress for the first time, in ERISA, wrote specific approval of the administrative offset (within limitation) into the law. Its failure to do so with respect to worker's compensation, which defendants also claim is a "retirement benefit created under State or Federal law," confirms Congressional intent not to permit offsets of worker's compensation or any other "retirement benefit created under State of Federal law."

gress need not have bothered to put its limited approval thereof in Title II of ERISA.

Third, it is clear that worker's compensation is not a retirement benefit created under State or Federal law, a qualification which must be read into the regulation, as the Sixth Circuit held. Appellees and respondent do not attempt to explain the stark omission of the word "retirement" from the Treasury Regulation, preferring to rely on whatever explanation is provided by Treasury. Treasury, however — in a startling about-face — defends this omission (Brief, 18, n. 10) by stating, first, that nothing in ERISA affirmatively prohibits worker's compensation offsets; and second, that it is its new 1977 regulation, Section 1.411(a)-4(a) (interpreting Code §411) which controls, not Section 1.401-4(b) (interpreting Code §401) — and significantly that §411, unlike §401, says nothing about "retirement benefits created under State or Federal law."

Apart from the intrinsic illogic of this "reasoning," discussed below, Treasury's position on this issue represents a belated, make-weight rationale which contradicts everything it formerly asserted. Before the Third Circuit, the Department entitled one argument in its *amicus* brief, at 20-28: "C. Worker's compensation benefits are included in 'retirement benefits' within the meaning of Section 401 (a)(5), Title 26." There, criticizing the trial judge for not appreciating the asserted relationship, the Department argued vigorously that there exists a "precise connection between" Code §401 and ERISA §203. (Brief of *amicus* United States to the Third Circuit below, p. 20, n. 7). According to Treasury, "[T]he question then . . . is whether, within the intendment of ERISA, 'retirement benefits' includes worker's compensation benefits."

Thus, as Treasury argued below, the phrase "retirement" benefits *must* be read into the regulations. This is particularly true, as Treasury argued below, in light of the history of the phrase "retirement benefits created under State or Federal law." The phrase was added to the Code by §162(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, which added

§165(a)(5) to the Code.[30] This section eventually became §401(a)(5) of the Code. The amendment was intended to permit the establishment of pension plans designed to supplement retirement benefits under the Social Security program. H.R. No. 2333, 77th Cong. 2d Sess., at 50-51, reprinted at 1943 CCH Standard Federal Tax Service, §1150. In 1943, Treasury Regulation 111 (1939 Code) was issued. §§29.165-3 and 29.165-4 thereof permitted integration with social security or other programs only if it resulted in "an integrated and correlated *retirement* system." (Emphasis added). (In discussing social security, §29.165-3 permitted only "offset by the *retirement* benefits provided."). This requirement is retained in virtually identical language, in Treasury Regulation §1-401-4(b), 26 C.R.F. §1.401-4(b) (1956), which remains in effect today.

Contrary to its urgings below, the Department also implies with considerable hubris that the 1977 regulation, having been issued under Code §411, and not §401, need not pertain only to "retirement" benefits created under Federal or State law. This is nonsensical, as Code §411 (like ERISA §203) contains no exception to its vesting and nonforfeiture requirements for *any* public benefits, including social security. To the extent that there is any authority under Code §411 and ERISA §203 for offsets for worker's compensation or other public benefits, defendants and heretofore Treasury itself (Brief, 14-16) have consistently contended that it derives from practices and regulations under §401 and Congress' asserted approval of them.[31]

Appellees and respondent cite many district court cases up-

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[30]"(5) A classification shall not be considered discriminatory within the meaning of paragraphs (3)(B) or (4) of this subsection merely because it includes employees the whole of whose remuneration constitutes 'wages' under section 1426(a)(1) (relating to the Federal Insurance Contributions Act). . . . Neither shall a plan be considered discriminatory within the meaning of such provisions . . . merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from 'wages' by section 1426(a)(1) . . . differ because of any *retirement* benefits created under State or Federal law." (Emphasis added.)

[31]Indeed, appellees argue that the 1977 Treasury regulation "harmonizes" the various ERISA provisions. (Brief, 30-31).

holding the Treasury Regulation. But a careful review of *all* of the opinions of the district court judges reveals that in *every* case where the Court scrutinized the regulation, it invalidated its application as permitting worker's compensation offsets.[32] As Judge King concluded in *Employee Benefits Comm, supra:* "To include workers' compensation benefits within the 'integration' of benefits provided for under section 405(a)(5), one would have to ignore the nature of workers' compensation." (Slip Op., 18). In clear contrast, each district court opinion permitting worker's compensation did so blindly, following the raised Treasury regulation without the slightest scrutiny. Indeed, in *Pavlovic* and *Dotson* (and perhaps *Carlson*), disability rather than normal retirement benefits were the subject of the offset.

Plainly, the Sixth Circuit and the district courts which rejected the application of the Regulation to worker's compensation offsets were correct.[33]

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[32]See *Utility Workers* v. *Consumers Power Co., supra, aff'g,* 453 F. Supp. 447 (1978); *Stong* v. *Bucyrus-Erie, supra;* and the district court decisions in *Buczysnki* and *Alessi.* For the latest such case, see *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co.* v. *Pascoe, supra.*

[33]The pre-ERISA state cases cited for worker's compensation offsets (Brief of respondent, 37, n. 52; brief of appellees, 25-26, n. 25) say nothing more than that the worker's compensation public policy of a jurisdiction is not violated by offsetting worker's compensation against pension benefits. (Contrary to respondent, *Paterson* v. *Southwestern Bell Telephone Co.,* 411 F. Supp. 79 (E.D. Okla. 1976) and *Fultz* v. *Union Carbide Corp.,* 219 Tenn 345, 409 S.W. 2d 541 (1966), cited by respondent at Brief, 37, n. 52, did not involve offsets against a pension plan's retirement benefits, but rather against disability benefits, respectively.) At least two cases reject even this holding, *Employee Benefits Committee* v. *Pascoe, supra; Massey* v. *D.C. Transit Sys., Inc.,* 338 F. 2d 584 (C.A.D.C. 1967) (Federal Longshoremen's and Harbor Worker's Compensation Act, 33 USC §915). Further, the holding to the same effect in *Renshaw* v. *U.S. Pipe & Foundry Co.,* 30 N.J. 458, 153 A. 2d 673 (1959), *specifically* moved the New Jersey legislature to repudiate it and enact the law expressly prohibiting such offsets.

Defendants significantly omit mention of the one surviving proposition of *Renshaw* regarding the nature of New Jersey worker's compensation:

> "The New Jersey theory is that liability or its extent is not based on the impairment or loss of earning power, but rather the loss ensuing from personal injury as it detracts from the former efficiency of the workman's body or its members in the ordinary pursuits of life." *Id,* at 465.

(Continued)

D. Defendant's other arguments are without merit.

Among defendants' many other arguments to which space and time limitations preclude a reply, only two need be noted.

A general theme which pervades the several defense briefs, and urged explicitly by *amicus* U.S. Chamber of Commerce (Brief, pp. 16-17), is that the present plan provisions were agreed to, or resulted from, "collective bargaining" and are a part of a "total compensation package" "negotiated" by the defendant employers and unions representing plaintiffs.

The first and most fundamental answer, as appellants themselves well know (Brief, p. 29), is that private agreements cannot override the congressional mandate but are subordinate to it. *Utility Workers Union of America* v *Consumers Power Co.*, *supra*, Slip Op. p. 12. Indeed, the "Pension Reform Act" was enacted precisely to overrule private agreements and abuses to the contrary, *cf. Nachman Corporation* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980).

Second, there is absolutely no evidence in either consolidated case that the worker's compensation offsets in issue were ever the subject of a "trade-off."[34]

With respect to economic arguments, the briefs of respondent and certain *amici* are replete with extravagant statements as to the purported cost of a disallowed worker's compensation offset, indeed to the point of a suggested threat to "the stability and continued existence of such plans." (Brief of respondent, p. 23, n. 33).

In the first place, of course, the cost is legally irrelevant,

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Finally, apart from not being "retirement" benefits, in no sense is worker's compensation a "public benefit," financed as it is not by taxes, but by employer contributions or premiums, a distinction recognized in *Richardson* v. *Belcher*, 404 U.S. 83, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971). See also the Sixth Circuit's analysis in this regard.

[34]In fact, the record evidence showed that there was no G.M. offset provision between 1964 and 1970. The record does not show, but appellants understand the fact to be that General Motors did not apply its offset to petitioners until 1977.

bearing no more upon a proper resolution of the issues before the Court than was the unanticipated cost to the employer in *Nachman*, or would be, in a suit testing their validity, the cost of the eligibility, vesting and funding provisions of ERISA generally.

With reference to the cost of worker's compensation offsets, specifically, the only economic data available are set forth in the Brief of Appellants at p. 19, n. 15, indicating *inter alia*, that the estimated number of affected pension plans is only 8.5% of all defined benefit plans, that the estimated number of affected claimants throughout the nation is but 2,000 per year or 0.006% of all plan participants, and that the anticipated increase in annual pension plan contributions would involve only 0.22% to 0.24% of current pension costs. Despite the dissenting opinion in *Utility Workers*, the only record evidence therein indicated that the cost was actuarially insignificant and not factored into plan design.

The ultimate economic realty is not that there is a threat to the stability of any retirement plan by effectuating the congressional intent of §203(a), but a windfall to affected employers in non-payment of deferred compensation to their employees if the offset is allowed. Whatever the cost is, it is realistically a matter of redistibution to other plan participants but at most *de minimis* as to them; while as to affected claimants, a matter almost literally of survival.

II.
THE PREEMPTION ARGUMENTS OF APPELLEES, RESPONDENT AND THEIR *AMICI CURIAE* ARE WITHOUT MERIT.

The Briefs of appellees, the Government and their *amici* are remarkable in that they do not even acknowledge, much less distinguish the very section of ERISA which excepts worker's compensation laws from the general preemption section of the Act — as a recent decision squarely holds.

Thus, although §514(a), 29 U.S.C. §1144(a), provides that, "except as provided in subsection (f) of this section, the provi-

sions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a)," the sentence concludes by stating, *"and not exempt under section 4(b)."* (Emphasis added).

Section 4(b)(3), 29 U.S.C. §10003(b)(3), in turn, expressly excepts from the coverage of the Act "any employee benefit plan if . . . (3) said plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws."

On authority of that plain exception to the general preemption rule of the Act, the Court in *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company* v *Pascoe*, ____ F. Supp. ____, No. 78-0483 (D. Hawaii, December 15, 1980), has just ruled that, "The clear policy of the State of Hawaii to prevent employers from taking any action to reduce their obligations to pay workers' compensation benefits bars any relief declaring that the [retirement plan's workers' compensation] offset is valid," (Slip Op, 25-26). "Any possible issue of federal pre-emption of ERISA of the State workers' compensation law is precluded by the language of ERISA." *Id*, Slip Op, 31, n. 26, citing §§514(a) and 4(b)(3).

Respondent G.M.'s argument that the General Motors plan is not *itself* a §4(b)(3) plan "maintained solely for the purpose of complying with applicable workmen's compensation laws" begs the question. It is the New Jersey *law* which is exempted from preemption under §4(b)(3), and consequently its terms prevail over plan provisions to the contrary. Obviously, if a plan which is designed to "comply with [an] applicable workmen's compensation law" is not preempted by ERISA, then *a fortiori* the underlying statute with which such plan is permitted to comply equally escapes coverage.[35]

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[35]G.M. also erroneously characterizes appellant's argument as being that the New Jersey workmen's compensation law is exempt from preemption because it does not relate to pension plans "*qua* pension plans." That is not appellants' argument, and the characterization is gratuitous.

This analysis was adopted in another recent decision cited by Respondent. Although the District Court in *Standard Oil Company of California* v. *Agsalud*, 442 F. Supp. 965 (N.D. Cal. 1977), affirmed 633 F. 2d 760 (9th Cir, 1980), held that Hawaii's Prepaid Health Care Act was preempted by ERISA, it expressly distinguished the worker's compensation and other exceptions of ERISA. Tracing the legislative history of §4(b)(3) of ERISA to §(b)(2) of the former Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 ("WPPDA"), 29 U.S.C. §303(b)(2), 442 F. Supp. 699, the Court concluded that, "In ERISA, Congress has said that all state laws relating to private employee benefit plans are pre-empted *except workmen's compensation, unemployment compensation, and disability insurance laws.*" At 698. (Emphasis added.) "Congress intended in ERISA to standardize the law governing employee benefit plans. It nevertheless permitted the states to continue to enforce their workmen's compensation, employment compensation, and disability insurance laws although those laws very substantially from state to state. *Mere incantation of the congressional goal of uniformity in regulation cannot resolve this question of statutory construction.*" At 706. (Emphasis added). "The inclusion of §4(b)(3) demonstrates that Congress was willing to sacrifice its goals of uniformity and minimum protection to substantive state interests." At 709.

It is all well and good to talk about the conceded expansive preemption language and intent of Congress in ERISA. It is quite another to disregard the explicit Congressional language and intent to exempt certain traditional social insurance laws such as worker's compensation. Although Congressman Dent spoke of the preemption clause as being "to many the crowning achievement of this legislation" — as several of the adversary briefs are quick to point out — it is important to recall that he concluded that statement by carefully asserting that preemption applies only to employee benefit plans "as described in section 4(a) *and not exempt* under section 4(b)." 120 Cong. Rec. 29197, 93d Cong. 2d Sess. (1974), III Leg. Hist., at 4671.

(Emphasis added). The New Jersey Workers' Compensation law is not preempted.

CONCLUSION

For the foregoing reasons appellants renew their prayer for relief, for reversal of the decision below.

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Nos. 79-1943 and 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, *et al.*,
Appellants,
v.
RAYBESTOS-MANHATTAN, INC., *et al.*,
Appellees.
[No. 79-1943]

HENRY BUCZYNSKI, *et al.*,
Petitioners,
v.
THE GENERAL MOTORS CORPORATION,
Respondent.
[No. 80-193]

On Appeal and Writ of Certiorari from Final Judgment of the United States Court of Appeals for the Third Circuit

BRIEF FOR STATE OF NEW JERSEY

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Question Presented

Did the Court of Appeals err in holding that the New Jersey law barring offsets of workmen's compensation benefits against retirement pension payments is preempted by the Employee Retirement Income Security Act of 1974?

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BRIEF FOR STATE OF NEW JERSEY

Statement of the Case

A. Alessi case.

The plaintiffs-appellants (hereafter plaintiffs) were formerly employed in New Jersey by appellee Raybestos-Manhattan Inc., were granted retirement in 1972 and 1973 and were entitled to retirement pension benefits under the Employee Retirement Plan incorporated in the collective bargaining agreement between their union and Raybestos. In October and November 1977 they obtained judgments against Raybestos in the New Jersey Division of Workers' Compensation awarding them workmen's compensation benefits. The Raybestos pension plan contained a provision requiring the reduction of pension payments by an amount equal to any workmen's compensation or other specified benefits payable for the same months. Pursuant to this offset clause, the plaintiffs' workmen's compensation benefits were offset against their pension benefits.

The plaintiffs filed this action seeking a declaratory judgment holding the offsets invalid under a July 1977 amendment to the New Jersey Workers' Compensation Law, N.J. Rev. Stat. (1977), ch. 156, prohibiting workmen's compensation setoffs against retirement pension benefits. The action was filed in the Superior Court of New Jersey on February 1, 1978 and was removed by Raybestos to the United States District Court for the District of New Jersey on March 3, 1978.

In a letter opinion dated February 15, 1979, the District Court held the offsets invalid under both the 1977 New Jersey law and the nonforfeiture provisions of the Employee Retirement Income Security Act of 1974. Final judgment was entered March 1, 1979 enjoining Raybestos from offsetting the plaintiffs' workmen's compensation pay-

ments against their pension benefits and directing the company to pay them the amounts previously deducted.

Raybestos appealed to the Court of Appeals for the Third Circuit on March 19, 1979. The Court of Appeals entered an order on September 7, 1979 granting the State of New Jersey's motion for leave to intervene as a party. In an opinion filed Febraury 15, 1980, the court held among other things that the 1977 New Jersey offset amendment is preempted by ERISA.*

The plaintiffs filed a notice of appeal with this Court April 25, 1980, and probable jurisdiction was noted November 3, 1980.

B. Buczynski case.

This action was filed August 5, 1977 in the Chancery Division of the New Jersey Superior Court and was removed by respondent General Motors Corporation to the United States District Court for the District of New Jersey by Petition for Removal filed August 9, 1977. The plaintiffs-petitioners had been employed by GM at various plants in New Jersey. Each was granted retirement prior to the July 14, 1977 amendment to the New Jersey Workers' Compensation Law prohibiting the setoff of benefits against nondisability retirement pension benefits. Prior to that date they filed claims for workmen's compensation against GM with the New Jersey Division of Workers' Compensation and obtained judgments awarding benefits.

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* While the State concurs in the plaintiffs' position respecting the invalidity under ERISA of the Raybestos pension plan offset clause, the only issue with respect to which the State is directly involved is the applicability of ERISA's preemption provision to the 1977 State amendment. This was the only substantive question argued by the State below, and is the only issue addressed in this brief.

The plaintiffs were notified by General Motors in June 1977 of its intent to make certain reductions in their retirement pension benefits in accordance with provisions of the pension plan for hourly-rate employees incorporated in the collective bargaining agreement between GM and the plaintiffs' bargaining representative, Local 736 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. These provisions stated that "unless prohibited by law" the company, with certain exceptions, shall deduct from a retiree's monthly pension benefits an amount equal to any workmen's compensation payments received for that period. The offset provisions appeared in essentially identical form in 1970, 1973 and 1976 versions of the pension plan.

The District Court granted the State of New Jersey's motion to intervene as a party defendant. By order dated August 9, 1978, the court certified the case as a class action on behalf of all retirees entitled to benefits under the General Motors Corporation Hourly Rate Employees Pension Plan payable for months beginning on or after April 1, 1971.

In an opinion dated August 24, 1978, the court invalidated the plan's offset clause as inconsistent with ERISA's nonforfeiture provisions, 29 U.S.C.A. §1053. It further held that even if these offsets were not deemed an unlawful forfeiture under ERISA, they would still be barred under the plan clause allowing such offsets "unless prohibited by law." The 1977 New Jersey amendment, it stated, constitutes just such a valid law barring offsets. The amendment, it concluded, is preempted neither under general preemption principles nor by the specific preemption provision of ERISA, 29 U.S.C.A. §1144(a), which states that the act's provisions, with certain exceptions, "shall supersede any and all State laws insofar as they

may now or hereafter relate to any employee benefit plan. . . ."

General Motors moved for reconsideration of the court's decision, and on December 20, 1978 the District Court filed a supplemental opinion adhering to its original ruling, including the conclusion that the New Jersey offset amendment was not preempted by ERISA.

General Motors appealed on April 12, 1979 to the Court of Appeals for the Third Circuit, which reversed the District Court in its opinion of February 15, 1980.

The plaintiffs filed a petition for writ of certiorari which was granted November 3, 1980.

ARGUMENT

A state is not preempted by ERISA from preserving workmen's compensation benefits awarded to employees by forbidding employers to set off benefits against retirement pension payments by the same employer.

N.J. Rev. State. (1977), ch. 156 provides that "The right of [workmen's] compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." The immediate purpose of the 1977 amendment was to resolve the uncertainty created by conflicting decisions of the New Jersey Superior Court on this issue. Compare *Conklin* v. *Bd. Trustees Police & Fire Ret. Syst.*, 135 N.J. Super. 131, 342 A.2d 872 (App. Div. 1975) with *Leoni* v. *Tp. of Hamilton*, 134 N.J. Super. 231, 339 A.2d 222 (App. Div. 1975). A statement appended to an earlier version of the bill enacted as the 1977 amendment set forth its substantive objective:

> "There are certain labor contracts and pension plans that provide for a deduction of workmen's compensation payments from monthly pension benefits. *This practice is contrary to the basic purposes of the Workmen's Compensation Act and should be prohibited by law.* This bill would provide such prohibition." (Emphasis added.)

One of the "basic purposes" of the Workers' Compensation Law* that the New Jersey Legislature might reasonably believe was being undermined by setoffs against retirement pension payments is the policy prohibiting employers from directly or indirectly recouping compensation benefits awarded employees. N.J. Stat. Ann. 34:15-40; *United States Casualty Co.* v. *Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (N.J. 1950). The Legislature might reasonably have concluded also that the prospect of such offsets serves to discourage the filing of compensation claims; an employee who, like the present plaintiffs, happens to sustain a work-related disability at or near the point where he is eligible for a retirement pension might well forbear the pursuit of workmen's compensation benefits that would be set off dollar for dollar against his pension right. *Cf. Lally* v. *Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960, 968 (Super. Ct. App. Div. 1980) ("Employer conduct which undermines employee resort to workers' compensation benefits has been characterized by the leading commentator as a matter of 'opprobrium' and as employer misconduct which is 'particularly repellent' . . . We agree. . . .") By barring workmen's compensation offsets against retirement (as opposed to disability) pension benefits, the 1977 amendment effectively nullified the Supreme Court of New Jersey's

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* The name of the program was changed in 1975 from workmen's to workers' compensation. N.J. Stat. Ann. 34:1A-5.1.

holding 18 years earlier in *Renshaw* v. *U.S. Pipe & Foundry Co.*, 30 N.J. 458, 153 A.2d 673 (N.J. 1959) that such offset provisions in collectively bargained pension agreements do not offend State public policy.

The issue here is whether the 1977 amendment "relates to" pension plans within the meaning of ERISA's preemption clause, 29 U.S.C.A. §1144(a), and is thus preempted by the federal act. That provision states that the provisions of ERISA ". . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(a) of this title." In considering the preemption issue, the fact that workmen's compensation programs and retirement pension plans serve distinct purposes is highly relevant. Payments under private pension plans of the G.M. and Raybestos type ". . . are predominantly rewards for continuous employment with the same employer." *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 594 (1977). By contrast, as the New Jersey Supreme Court noted in *Renshaw, supra,* the "theory" underlying the New Jersey Workers' Compensation Law is that ". . . liability or its extent *is not based on the impairment or loss of earning power, but rather the loss ensuing from personal injury as it detracts from the former efficiency of the workman's body or its members in the ordinary pursuits of life.*" 153 A.2d at 677 (emphasis added). In addition to awards based on disabilities either partial or total in scope and temporary or permanent in duration, N.J. Stat. Ann. 34:15-12, the New Jersey act requires the employer to pay the necessary and reasonable medical, surgical and hospital costs of an injured worker, N.J. Stat. Ann. 34:15-15.

As made clear in the legislative statement quoted above and noted by the District Court in *Buczynski,* the 1977

amendment ". . . is in no way concerned with pension plans *qua* pension plans. *On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits.*" 456 F. Supp. 867, 873 (D. N.J. 1978) (emphasis added). Indeed, the distinction between pension payments and workmen's compensation benefits is explicitly recognized in ERISA itself; section 1003(b)(3) excludes from the act's coverage benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws. . . ." Nor can the important social purposes served by workmen's compensation laws be ignored. As the Court observed in the seminal case upholding the constitutionality of these laws 63 years ago, ". . . laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." *New York Central R. Co.* v. *White,* 243 U.S. 188, 207 (1917). In light of the different purposes served by the State and federal acts, the fact that the New Jersey statute is one of general applicability whose object and concern is not pension plans but preservation of workmen's compensation payments to disabled workers, and the fact that New Jersey, in the words of the District Court in *Alessi,* "has a strong local interest in maintaining a competent worker's compensation program," N.J. Rev. Stat. (1977), ch. 156 is not preempted by ERISA.

The controlling principles are articulated in the plurality opinion for the Court in *New York Tel. Co. of New York St. Dept. of Labor,* 440 U.S. 519 (1979). The issue there was whether a state law authorizing the payment of unemployment compensation benefits to strikers was

preempted by the NLRA by reason of "the possible impact of unemployment compensation on the bargaining process." *Id.* at 544. In addition to the explicit NLRA provision preempting state jurisdiction over unfair labor practices, 29 U.S.C.A. §160(a), the Court noted that it had enunciated a broad NLRA preemption doctrine dictating, for example, that "Congress intended to forbid state regulation of economic warfare between labor and management, even though it was clear that none of the regulated conduct on either side was covered by the federal statute." *Id.* at 530. Despite these expansive labor law preemption principles, and despite its acceptance of the district court's finding that the New York law "has altered the economic balance between labor and management," *id.* at 531-532, the plurality opinion* concluded that the state act was not preempted by the NLRA.

Significantly, the Court in so holding commented on "the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria." *Id.* at 539. In language equally applicable here, it noted:

> ". . . the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. *It involves*

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* Three Justices who concurred in the result joined only that part of the three-Justice plurality opinion which discerned from the legislative history of the NLRA and the Social Security Act an intent to permit state unemployment benefit payments to strikers; the concurring Justices refrained from joining—without explicitly rejecting—the plurality's further conclusion that the New York act would not otherwise be preempted by federal labor policy. Two of the concurring Justices questioned whether the New York law could be sustained under the preemption principles discussed by the plurality, but no Justice intimated any disagreement with the validity of the principles themselves.

> *a state program for the distribution of benefits to certain members of the public.* Although the class benefited is primarily made up of employees in the State and the class providing the benefits is primarily made up of employers in the State, and although some of the members of each class are occasionally engaged in labor disputes, *the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of insuring employment security in the State.*" *Id.* at 532-533 (emphasis added).

Rather than intending to regulate conduct within the jurisdiction of the National Labor Relations Board, the Court added, New York—no less than New Jersey through Rev. Stat. (1977), ch. 156—"has sought to administer its unemployment compensation program in a manner that it believes best effectuates the purposes of that scheme." *Id.* at 545-546. For these reasons the New York Act was entitled to "the same deference that we have afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.'" *Id.* at 539-540. This meant that "'in the absence of *compelling congressional direction,* we could not infer that Congress had deprived the States of the power to act.'" *Id.* at 540 (quoting *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 244 (1959) (emphasis added)).

The New Jersey amendment barring workmen's compensation offsets against nondisability pension benefits is fully consistent with ERISA. Even if the Court of Appeals were correct in holding that ERISA's nonforfeiture provisions do not themselves bar such offsets, the act certainly cannot be said to explicitly permit or require them; nor does it indicate that a state may not prohibit these offsets where,

as here, the state concludes they undermine the purposes of its workmen's compensation program. The New Jersey amendment is designed, not to regulate pension plans, but to implement the State's workmen's compensation law. Like other laws enacted under the states' police powers, *New York Central R. Co., supra,* the New Jersey act is "deeply rooted in local feeling and responsibility" and thus entitled to "the same deference . . . afforded analogous state laws of general applicability." *New York Tel. Co., supra.* ERISA evidences no "compelling congressional direction" from which it can be concluded that "Congress had deprived the States of the power to act." *Ibid.* It would be ironic indeed if a federal act whose purpose is to protect the legitimate pension rights of employees were construed to preempt a similarly remedial state provision whose sole intent is to preserve the workmen's compensation entitlement of those employed by the same employer.

For these reasons, the New Jersey act prohibiting employers against whom a workmen's compensation judgment has been entered from offsetting such benefits against nondisability pension benefits payable to the same employee does not "relate to" ERISA-regulated pension plans within the intendment of 29 U.S.C.A. §1144(a).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be reversed insofar as it holds N.J. Rev. Stat. (1977), ch. 156 to have been preempted by ERISA.

Respectfully submitted,

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On the Brief

IN THE

Supreme Court of the United States

February Term, 1981

No. 80-193
No. 79-1943

HENRY BUCZYNSKI, et al.,
Appellants,

against

THE GENERAL MOTORS CORPORATION,
Appellee.

JOSEPH ALESSI, et al.,
Appellants,

against

RAYBESTOS-MANHATTAN, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL RETIRED TEACHERS ASSOCIATION

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IN THE

Supreme Court of the United States

February Term, 1981

No. 80-193
No. 79-1943

HENRY BUCZYNSKI, ALEX BORUSOVIC, and other Retirees similarly situated,

Appellants,

against

THE GENERAL MOTORS CORPORATION,

Appellee.

STATE OF NEW JERSEY,

Intervenor.

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,

Appellants,

against

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND STATEMENT OF INTEREST OF AMICI CURIAE

The American Association of Retired Persons ("AARP") and the National Retired Teachers Association ("NRTA"), of 1909 K Street, N.W., Washington, D.C. 20049, respectfully move the Court, pursuant to Rule 36 of the Rules of the United

States Supreme Court, for permission to file the attached brief amici curiae for the reasons set forth below, which also disclose the interest of the amici.

AARP and NRTA are affiliated and jointly administered not-for-profit membership corporations of more than 12,500,000 persons over the age of 55. This figure represents approximately one out of four people over the age of 55 nationwide, the largest organized group of older Americans in the country.

Among the purposes of AARP and NRTA are: to enhance the quality of life for older Americans; to promote independence, dignity and purpose for older persons; to help to understand aging and its ramifications; to seek to foster equality of opportunity for the aging; and to offer older citizens opportunities to plan a way of life designed to obtain maximum enrichment, and to promote means by which our older citizens can maintain and improve the economic status to which they are accustomed and entitled.

Although exact figures are not available concerning the number of AARP-NRTA members who participate in private pension plans and/or receive workmen's compensation benefits, it safely can be stated that the numbers are enormous. Since the decision of the Court will determine the propriety of an employer offsetting workmen's compensation payments against pension benefits, the outcome of this appeal is especially critical to the welfare of AARP and NRTA members and all older Americans.

AARP and NRTA believe that this attempted offsetting is an unconscionable effort by employers to meet with a single payment two separate and distinct obligations owed to employees. The effect of this practice can be particularly devastating to older citizens, for whom pension payments, frequently supplemented by workmen's compensation payments, often is the primary source of income. Amici are interested in assuring for older Americans the full economic benefits to which their lifetime of labor equitably entitle them. As a representative of

over 12½ million older citizens, AARP-NRTA bring a unique perspective to the issues involved in this proceeding.

Amici have been unable to obtain the consent of the appellees to the filing of the attached brief, thus necessitating this motion.

WHEREFORE, AARP and NRTA respectfully move for permission to file the attached brief amici curiae.

Respectfully submitted,

MILLER, SINGER, MICHAELSON & RAIVES

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IN THE

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February Term, 1981

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE

Introduction

Pension benefits in no sense are a product simply of employer largesse. Often, employees make direct contributions to the trust from which their pension benefits ultimately are paid. To the extent that employers contribute to the same trust,

they receive a very real and substantial, and bargained for, consideration for so doing in the form of employee willingness to accept lower immediate compensation.

Similarly, employers receive very real consideration for the obligations imposed upon them by state workmen's compensation laws; the protection against suits by employees seeking greater amounts than are provided by statute.

By offsetting workmen's compensation benefits against pension benefits, employers are reaping an unjustifiable windfall, receiving two separate and distinct considerations for the same dollar payment. Workers, on the other hand, are compelled either to forego their hard won workmen's compensation benefits or accept a diminution of their equally hard won pension benefits.

This fundamental inequity, so obviously contrary to both the spirit and the letter of the Employee Retirement Income Security Act of 1974 ("ERISA"), was ignored totally in the decision of the Third Circuit. Amici submit that if the essential unfairness of this offset is considered in light of the purpose and concept of ERISA as a whole, such offset must be invalidated, and the decision of the Third Circuit reversed.

ARGUMENT

I.

THE LANGUAGE, HISTORY AND PURPOSES OF ERISA MANDATE THAT AN EMPLOYEE'S RIGHTS TO VESTED RETIREMENT BENEFITS CANNOT BE TAKEN AWAY OR COMPROMISED FOR ANY REASON, WITH CERTAIN EXCEPTIONS NOT HERE RELEVANT

In 1974, Congress declared it to be the public policy of the United States to improve "the *equitable* character of [employee pension] plans by requiring them to vest the accrued benefits of

employees with significant periods of service . . ." ERISA Sec. 2(c), 29 USC Sec. 1001(c) (emphasis supplied).

Congress was mindful that employees "with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in [their] plans," ERISA Sec. 2(a), 29 USC Sec. 1001(a), despite the fact, which Congress also recognized, that such retirement benefits, although nominally paid by employers, really amount to deferred compensation earned by their employees which is expected to be received in lieu of current wages.

To assure that such benefits will in fact be received and will no longer be lost, Congress mandated in ERISA certain minimal standards to assure that such benefits unconditionally will be guaranteed ("vested") to each employee after he has served a minimum number of years, typically ten.

To reinforce that mandate, Congress further established a general rule of "non-forfeitability"—that is, after the stated minimum statutory period, employees' accrued benefits will not be subject to defeasance for *any* reason.*

> "With the limited exceptions noted above, *no rights, once they are required to be vested may be lost by the employee under any circumstances . . .*" Senate Finance Committee, Report No. 93-383, *US Code, Congressional and Administrative News*, 1974, at 4934-4935; House Ways and Means Committee, Report No. 93-807, *Id.*, at 4726. (emphasis supplied)

The workmen's compensation offset provision sanctioned by the Third Circuit cannot be reconciled with these clear expressions of Congressional intent and purpose. In ERISA, Congress sought to insure that employers not deprive their workers of the retirement benefits to which they were entitled. Yet, by means of a workmen's compensation offset, employers

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ERISA Sec. 203(a), 29 USC Sec. 1053(a). Subsection 3 of that section provides four exceptions to this rule, none of which concern offsets for workmen's compensation benefits.

can do just that simply by making the workmen's compensation payments which they are required to make anyway by state statutes.

When viewed in traditional contract terms, the gross inequity of the offset is apparent. On the one hand, employer and employee have entered into a first contract whereby the employee agrees to forego additional immediate compensation in return for the employer's agreement to make specified pension payments in the future. On the other hand, employer and employee have entered into a separate and distinct second contract whereby the employee agrees not to sue the employer for work related injuries in return for the employer's agreement to make specified payments on account of any such injuries. The employee lives up to his end of both contracts: he accepts lower immediate compensation, and he does not sue the employer for his work related injuries. The employer, however, makes *only* the payment required by the *second* contract, then contends that he has performed his obligations under *both* contracts. Surely, such a result would not be countenanced by this Court.

Yet this is precisely what appellees seek to do by means of the workmen's compensation offset. They seek this Court's sanction to use the same dollar to pay separate and distinct obligations for which they received separate and distinct considerations.

In addition to this basic unfairness, the workmen's compensation offset totally frustrates the strong public policy embodied in state workmen's compensation laws. There can be no question but that the purpose behind such laws is to place the burden of work related injuries upon the employers who profit from the injured worker's labor, and to provide those employers with a liability which is limited and definite. But, if workmen's compensation payments may be offset against the injured worker's pension benefits, the burden for the work related injury is shifted from employer to employee. The

employer still receives his benefit under the statute—a limited and definite liability—but he is relieved of his obligation.

Further, this Court must consider the inherent inequality involved where two workers, one in good health, the other having had the misfortune to suffer a job related, perhaps incapacitating injury, receive identical benefits upon retirement. Workmen's compensation, as the name implies, is designed to compensate workers for such injuries; yet, if the offset is upheld, the injured worker is denied even one additional penny to compensate him for the extra financial, physical and emotional hardships he endures from his disability.

CONCLUSION

Amici will not burden the Court with a repetition of the many compelling legal arguments advanced in support of appellants' claim that the workmen's compensation offset is a direct violation of ERISA Sec. 203(a), 29 USC Sec. 1053(a). However, amici represent some 12½ million older Americans, many of whose sole source of income comes from pensions and Social Security, and the more unfortunate of whom also collect workmen's compensation payments. In addition, as of 1975 some 50,000,000 Americans were participants in private pension plans (America Council of Life Insurance, ***Pension Facts 1977,*** at 20) and, as of 1972, some 2,000,000 Americans were receiving workmen's compensation payments (Daniel N. Price, ***A Look at Workers' Compensation Beneficiaries,*** appearing in Social Security Bulletin of October, 1976 at 38-47). This Court's decision will affect all of them, as it surely will affect millions of citizens in the future.

In reaching that decision, amici urge the Court to keep always in mind the fundamental contradiction between the expressed purpose of ERISA—to guarantee that pension plans be ***equitable*** (29 USC Sec. 1001(c))—and the greatly ***inequitable*** nature of the workmen's compensation offset. Amici believe that that offset clearly is prohibited by ERISA. If this Court entertains any doubts, amici pray they will be resolved in

favor of that which is fair, just and equitable—and that the offset be disallowed. The decision of the Third Circuit should be reversed.

Respectfully submitted,

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Dated: December 15, 1980
New York, New York

Nos. 80-193, 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, et al., *Petitioners,*

v.

THE GENERAL MOTORS CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOSEPH ALESSI, et al., *Appellants,*

v.

RAYBESTOS-MANHATTAN, INC., et al., *Appellees.*

On Appeal From the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT AND APPELLEES

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Nos. 80-193, 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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v.

THE GENERAL MOTORS CORPORATION, *Respondent.*

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JOSEPH ALESSI, et al., *Appellants,*

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RAYBESTOS-MANHATTAN, INC., et al., *Appellees.*

On Appeal From the United States Court of Appeals for the Third Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT AND APPELLEES

The Chamber of Commerce of the United States of America ("Chamber"), pursuant to Rule 36 of this Court, hereby moves for permission to file a brief

amicus curiae in support of the Appellees, Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan, in No. 79-1943, and the Respondent, General Motors Corporation, in No. 80-193.

In support of its Motion, the Chamber states:

1. The Chamber regularly represents the views of its more than 100,000 business members in litigation pending before this Court and the lower Federal and State courts on a broad range of issues, including matters related to the interpretation and implementation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1]

2. In addition, the Chamber has regularly represented its views to the United States Congress, the Treasury Department and the Department of Labor on the various facets of ERISA administration and enforcement which affect the Chamber's members who are plan sponsors and plan administrators.

3. The instant cases present substantial questions of direct concern to the Chamber and its members who are subject to ERISA. First, many plans sponsored or administered by Chamber members provide for the integration of benefits provided by one or more employer financed compensation plans with benefits provided from pension plan assets.[2]

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[1] For example, the Chamber filed a brief *amicus curiae* in support of the pension plan sponsor in *Daniel* v. *Teamsters*, 439 U.S. 551 (1979); and intervened in *Trombly* v. *Marshall*, No. 7915-75 (D.D.C. 1980), in support of the proposition that disclaimer statements in Summary Plan Descriptions are permitted by ERISA.

[2] Although the Chamber does not know the number of pension plans which specifically provide for integration of workmen's compensation benefits, for purposes of this Motion, the Chamber ac-

Second, the Chamber believes that the congressional intent underlying ERISA is best reflected, and the interest of plan sponsors, administrators, participants and beneficiaries are best served, by considering the interrelationship of the various types of employer-financed compensation benefits; and the Chamber rejects the fragmented and piecemeal analysis which underlies Appellants' and Petitioners' arguments.

Third, the Chamber and its members, many of which are multi-state enterprises, support the expansive preemption provision of ERISA, which ensures a consistent and harmonious interpretation and administration of employee benefit programs. The Chamber and its members are concerned that the broad meaning intended for this provision should be preserved, and not suffer the erosion which Appellants and Petitioners would permit, contrary to the intent of Congress.

For the foregoing reasons, and the reasons more fully set forth in the accompanying brief, the Chamber respectfully requests that its Motion be granted.

Respectfully submitted,

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cepts the representation of Appellants, that there are more than 7,000 plans in force which contain such a provision. *See,* Brief of Appellants at 19, n.15.

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Nos. 80-193, 79-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, et al., *Petitioners,*

v.

THE GENERAL MOTORS CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOSEPH ALESSI, et al., *Appellants,*

v.

RAYBESTOS-MANHATTAN, INC., et al., *Appellees.*

On Appeal From the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT AND APPELLEES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the largest federation

of business, trade and professional organizations and individuals in the United States and, as such, is the principal spokesman for the American business community.

The Chamber has a direct membership of over 100,000 corporations, partnerships, proprietorships, and professionals, as well as over 3,700 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the courts, including issues related to the implementation and interpretation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1] The Chamber also represents its members before the United States Congress, the Executive Branch and Federal regulatory agencies concerning matters of interest to the American business community, including issues relating to the administration and interpretation of pension and welfare plans. Such representation constitutes a significant aspect of the Chamber's activities.

The underlying issues in the present cases are of direct and substantial interest to the Chamber and its members.

First, many pension plans sponsored or administered by Chamber members provide for the integration of benefits provided by one or more employer-

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[1] *Daniel* v. *Teamsters*, 439 U.S. 551 (1979); *Trombly* v. *Marshall*, No. 7915-75 (D.D.C. 1980) (intervenor-defendant in support of proposition that ERISA permits disclaimer statements in Summary Plan Descriptions); *Upjohn Co.* v. *United States*, No. 79-886 (January 13, 1981); *American Textile Mfg. Institute, Inc.* v. *Ray Marshall*, Nos. 79-1429, 79-1583, 79-1789.

financed compensation plans, such as social security and workmen's compensation, with benefits provided from the pension fund.[2]

Second, it cannot be gainsaid that litigation involving the meaning and interpretation of ERISA is just beginning to wend its way through the federal courts. At this seminal stage of the development of Supreme Court case law in this area, the Chamber believes that these cases present an opportunity for this Court to provide guidance to the lower federal courts by ruling that, where appropriate, ERISA issues should be decided in the interest of the interrelated forms of employer funded income paid during retirement. And, in these cases in particular, where the pension plans which have given rise to this litigation are the product of collective bargaining, this judicial focus may be more appropriate.

Third, Petitioners and Appellants here raise the unfortunate spectre of possible judicial contraction of the plain words and legislative history which underlies the preemption provision of § 514 of ERISA, 29 U.S.C. § 1144(a). The Chamber believes that it is critical to the sound and orderly administration of both pension and welfare plans that there be but one set of rules which govern; namely, those contained in ERISA and the duly promulgated regulations issued thereunder. Any other result is not in the best interest of plan sponsors, administrators, participants or beneficiaries.

It is for these reasons that the Chamber respectfully submits its views.

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[2] Indeed, as noted by Appellants there may well be some 7,000 plans which specifically provide for the integration of workers' compensation benefits.

SUMMARY OF ARGUMENT

Despite the extensive revisions introduced in employee benefits law by the Employee Retirement Income Security Act of 1974, it neither compels employers to establish private retirement programs, nor mandates that parties could *not* agree to consider income benefits from other employer financed sources in determining private retirement income.

This method of determining the level of private retirement income under the plan was permissible prior to ERISA's enactment, and ERISA's legislative history, as well as subsequent regulatory and legislative events, demonstrates its continued vitality.

In addition, other policy considerations militate in favor of the practice. First, both plans being challenged in this case were collectively bargained, and the policy considerations underlying the National Labor Relations Act argue in favor of permitting bargaining parties to choose how post-retirement income needs are best met, considering the costs which the plan sponsor is willing to incur. Second, several Federally appointed study groups have favored coordination of employer funded benefit packages.

Since ERISA permits integrating retirement benefits with workers' compensation benefits, the plan provisions are valid notwithstanding New Jersey's Workers' Compensation Statute. That statute is superceded by ERISA's preemption of all state laws "relating to" employee benefit plans.

ARGUMENT

I. ERISA's Statutory Terms, Legislative History and Regulatory History Permit Offsets in Computing Benefits.

The issue before this Court is whether the provisions of a defined benefit, employer funded retirement plan, which require integration with employer funded amounts paid under workers' compensation programs, works an illegal forfeiture of vested rights under Section 203(a) of ERISA, 29 U.S.C. § 1053(a). In framing their arguments both below and before this Court, both Appellants and Petitioners have muddled the terms "vested," and "nonforfeitable." Their error is the product of their misapprehension of concepts which were embodied in pre-ERISA pension law, and which have remained fundamentally unchanged by ERISA.

As a legal principle, then, the Chamber maintains that employers remain free to choose the benefit formulas to be incorporated in their plans.

A.

Our analysis begins, as it must, with reference to § 203(a) itself, which provides that an employee's right to his normal retirement benefit must be nonforfeitable at normal retirement age. But neither that provision, nor any other section of ERISA, prescribes the amount of benefits which must be provided by a plan. That decision is left to the plan sponsor and, in these cases, to the collective bargaining process.

Rather, ERISA describes a normal retirement benefit as the benefit *"under the plan."* ERISA, § 3(22), 29 U.S.C. § 1002(22) (emphasis added). Moreover,

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred *benefit under a pension plan* which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

ERISA, § 3(19), 29 U.S.C. § 1002(19) (emphasis added).

In computing the *amount* of the retirement benefit one must look to the terms of the plan. It follows that in determining the amount of the *nonforfeitable* benefit, one must also look to the plan. Thus, Petitioners correctly state that "[u]nder [GM's] plan, a participant who completes ten years of service has at that moment, a vested, nonforfeitable right to receive, when he attains normal retirement age, all retirement benefits derived from employer contributions which he has accrued to that period." Petitioners' Brief at 9. This, however, is merely the beginning of the inquiry, for the next level requires examination of the plan benefit formula, which in these cases includes years of covered service, age, *and* amount received from *employer* funded workers' compensation benefits.[3]

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[3] Thus, the GM plan provides:

> Section 2. Deductions for Workmen's Compensation in determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be en-

That the computation of the amount of the defined benefit, including any offsets, is controlled by the plan itself is buttressed by this Court's recent close scrutiny of the phrase "nonforfeitable benefit" contained in Title I of ERISA. In *Nachman Corp.* v. *PBGC*, U.S. , 64 L.Ed.2d 354 (1980), the sponsoring employer of a terminated plan asked this Court to construe Section 3(19) of ERISA. In that case, this Court held[4] "it is the *claim* to the benefit, *rather than the*

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acted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

Similarly, the Raybestos offset provision reads:

All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

[4] The provisions of the plans at issue here are quite dissimilar to the terms of the *Nachman* plan, in that, the *Nachman* plan "provided for the payment of monthly benefits computed [solely] on the basis of age and years of service at the time of retirement." *Id.* at 360. And, an undisputed fact in that case was that "[a]t that time 135 employees had accrued benefits with an average value of approximately $77 per month. Those benefits were concededly vested in a contractual sense." *Id.* at 361.

benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.' " *Id.* at 365-66 (emphasis added). In addition, the Court went on to observe that, "[i]t is . . . surely consistent with the statutory definition of 'nonforfeitable' to view it as describing the *quality* of the participant's right to a pension rather than a limit on the amount he may collect." *Id.* at 365 (emphasis added).

In the instant cases, unlike *Nachman,* there is no attempt to divest employees of vested benefits. *See,* note 4, *supra.* And it is undisputed that Petitioners and Appellants have *claims* for benefits. Nor is there any attempt to diminish, in any way, the quality of their claims. The employers stand ready and willing to pay *all* of the benefits to which the participants are entitled under their respective plans. Their sole objection is to paying benefits in addition to those negotiated under their collective bargaining plans.

A recent decision of the Sixth Circuit illustrates its misunderstanding of the statutory scheme described *supra,* as well as this Court's decision in *Nachman.* In *Utility Workers' Union, et al.* v. *Consumers Power Co., et al.,* No. 78-1402 (6th Cir. Jan. 6, 1981), *petition for recon. en banc pending,* Judge Peck wrote:

> When Congress enacted ERISA, it was concerned about employees who, after years of service to their employers, were denied pension benefits on account of their pension plan's restrictive *vesting* provision. In the Act, Congress intended to provide these employees with guarantees that, after they had completed certain required years of service, they would gain unconditional rights to fixed pension benefits. Accordingly, Congress incorporated into Section 203 of ERISA a broad proscription against *forfeitures* . . . .

Slip Opinion, p. 9 (emphasis added).

With due respect to the Sixth Circuit, it is submitted that the majority makes the same mistake as Petitioners and Appellants in these cases. It is simply incorrect to conclude that because Congress prohibited *forfeitures*, it proscribed a benefit formula which requires *reductions* of other employer funded benefits.

Further, review of the statutory scheme of ERISA, as well as the legislative and regulatory history which surround the statute's enactment, further support the proposition that the integration of workmen's compensation benefits is permissible.

The statutory scheme of ERISA is marked by purposeful specificity where Congress so intended, and general provisions where Congress determined that the discretionary powers of plan sponsors and the collective bargaining process, where applicable, would be most appropriately exercised.

Thus, for example, Title I of ERISA requires that plans adopt amending language designed to create new safeguards in several important areas. It enhanced participants' prospects of actually receiving benefits that are promised under plan provisions by establishing minimum funding standards to ensure funding of annual costs on a current basis, and to amortize past unfunded liabilities. It also established standards to ensure that a certain percentage of employees of a sponsoring employer would be permitted to participate in its retirement plans. Title I also established minimum vesting standards which require that an employee's right to retirement benefits be nonforfeitable in accordance with one of three alternative minimum vesting schedules.[5] And, to ensure that the vesting

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[5] It is noteworthy that ERISA is a statute of *minimum standards*, which permits plan sponsors either unilaterally or through

requirements applicable to employer contributions would be meaningful, Congress adopted minimum standards on the rate of benefit accruals.[6]

ERISA also explicitly altered certain other pre-ERISA concepts, other than those which affected plan provisions themselves. For example, Section 409(a), 29 U.S.C. §1109(a) increases the number of plan fiduciaries, and makes them personally liable for their responsibilities, obligations or duties.[7]

Perhaps the most radical new concept adopted by ERISA is its termination insurance program. This program constitutes Congress' recognition that the minimum funding standards might not be sufficient to protect participants against inadequate funding, and provides for the PBGC to pay benefits to participants in defined benefit plans, when the plans terminate without sufficient assets to pay "guaranteed" benefits.[8]

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collective bargaining to voluntarily adopt provisions which exceed those minimums.

[6] H. Rep. No. 93-807, 93rd Cong., 2d Sess. 60 (1974).

[7] Prior to ERISA pension trustees were not considered parties to the contract; therefore, they were not held liable for losses. *See* Glanzer, *The Impact of ERISA on Collective Bargaining*, 52 St. John's L. Rev. 531, n. 72 at 542 (1978).

[8] It is important to emphasize that this insurance program does not let employers "off the hook" for these insured benefits. For the PBGC receives no public funds. Rather, the program is funded primarily from two assessments, both of which are imposed upon *employers*. First, the PBGC collects premiums from employers based upon the number of employees participating in their plans. ERISA, § 4006, 29 U.S.C. § 1306. Second, when the PBGC pays benefits to participants in terminated plans, the sponsoring employer incurs a liability to the PBGC up to 30% of its net worth. ERISA, § 4062(b), 29 U.S.C. § 1362(b).

What the foregoing catalogue of ERISA provisions makes patently clear is that in areas where Congress intended to effect substantive changes in the law, Congress spoke with precision and clarity. That precision and clarity makes even more unavoidable the conclusion that in areas where Congress was silent, it intended that pre-ERISA practices would continue in effect.

B.

We turn next to an examination of the legislative and regulatory history which relates to pension plan offsets.

Offsetting was a permissible practice in benefit computations prior to ERISA's enactment, and that practice has been approved by Congress. There can be no dispute that, prior to ERISA, the Internal Revenue Code permitted integrating pension benefits with workers' compensation and other employer provided forms of compensation in tax qualified plans. When Congress enacted the Internal Revenue Code of 1954, 26 U.S.C. § 1 *et seq.*, it approved offsets of social security benefits and other "retirement benefits created under state or federal law." 26 U.S.C. § 401(a)(5).

In 1968 the Internal Revenue Service, interpreting Section 401(a)(5), held in Rev. Rul. 68-243 that:

> A program, like the social security program, that requires *employer contributions* and *makes benefits available to the general public* is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.
>
> * * *
>
> However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer.

Rev. Rul. 68-243, 1968-1 C.B. 157, 158 (emphasis added).

The next year the Service affirmed this ruling, stating:

> Benefits provided under a pension . . . plan may be integrated with those provided under a state or Federal program that, like the social security programs, requires *employer contribution* and makes benefits available to the *general public.* Thus, benefits payable under a state workmen's compensation law may be an acceptable offset against benefits payable under a qualified plan. However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer.

Rev. Rul. 69-421, § 4(j)(4) 1969-2 C.B. 59, 72 (emphasis added).

If, in reenacting the new Code provisions which became a part of ERISA, Congress had either repealed Section 401(a)(5) or explicitly or implicitly signaled its intention to overrule or repeal the IRS' interpretation, then these pre-ERISA rulings would carry no weight. But Congress did neither.

Rather, Congress reenacted Section 401(a)(5) in substantially the same form. Indeed, the House Conference Report accompanying ERISA stated:

> . . . the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the *present antidiscrimination rules* with respect to coverage, and with respect to contributions and *benefits are to remain in effect.* Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H. Rep. No. 93-1280 93d Cong., 2d Sess. 277 (1974) (emphasis added).

It is a time honored rule that, "long-standing administrative interpretations applying to a substantially reenacted statute, [are] deemed to have received congressional approval and [have] the effect of law." *Commissioner* v. *Estate of Noel,* 380 U.S. 678, 682 (1965); *see also, NLRB* v. *Bell Aerospace,* 416 U.S. 267, 274 (1964); *Helvering* v. *Winmill,* 305 U.S. 79, 83 (1938).

Moreover, the Conference Committee's remark that the "present antidiscrimination rules" relating to contributions and benefits would "remain in effect" demonstrates that Congress was aware of these rules. Thus, Congress intended to reenact these pre-ERISA IRS rulings, and their vitality survives to this date.[9]

The correctness of the Chamber's viewpoint is made even more poignant and is further buttressed by recent legislative activity on this very issue. On January 24, 1979, Senators Harrison Williams and Jacob Javits, two of the leading Senate champions of ERISA, introduced S.209, titled "The ERISA Improvements Act of 1979." Section 126(a)(3) of that proposed legislation, which never became law, would have amended ERISA prospectively to prohibit offsetting pension benefits against workers' compensation benefits. This legislative proposal prompted a study commissioned

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[9] Since ERISA's enactment both the IRS and the PBGC have promulgated regulations adopting these concepts. See 29 C.F.R. § 2605 (1980) (PBGC's regulation defining "nonforfeitable" for purposes of Title IV), and 26 C.F.R. § 1.411(a)(4)(a) (the IRS regulation, which was discussed at length in the Third Circuit's opinion in this case).

by the U.S. Department of Labor and conducted by the Hay Associates. That study concluded, "there is nothing [presently] in ERISA to preclude a pension plan from reducing benefits when a beneficiary receives a workers' compensation award." Analysis of Pension Plans/Workers Compensation Offsets, April 13, 1979 at 1. The study also reported that "[t]he proposed legislation arose from a pending case in New Jersey involving a General Motors plant where an employee's pension benefit was reduced due to a Workers' Compensation offset."[10] *Id.* at 5 (emphasis added).

From the foregoing, the inferences are inescapable. The Senators were apprised of this very case which was then pending in the courts. Cognizant of the fact that the formula incorporated in the GM plan was a permitted practice, the Senators attempted to provide legislative relief via an amendment to ERISA. That legislative package never became law. Thus, the law as it existed in 1979 remains so today.

C.

The Chamber respectfully suggests that the view of the Internal Revenue Service, as evidenced by the pre- and post-ERISA revenue rulings discussed *supra,* that the integration of workmen's compensation benefits is permissible, represents a more constructive view of the relationship of various social benefits available today. Indeed, this is the view of at least two presidential advisory groups and Arthur Larson, a recognized expert on workmen's compensation.

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[10] *Buczynski et al.* v. *GM et al.,* No. 80-193, had been filed on August 5, 1977.

In his treatise on the subject, Mr. Larson argues that when one analyzes the various programs that provide financial benefits to employees, "[t]he crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable." 4 Larson, Workmen's Compensation Law, § 97.10 at 18-19 (1980). Mr. Larson goes on to state that when employees suffer wage losses covered by several programs, the employee should not receive a package of benefits resulting in more than his actual wage. Rather, workmen's compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance should all be viewed as "parts of a system" which permits coordination of benefits. *Id.* at 18-19. And, such coordination of benefits is precisely what the challenged provisions of the pension plans at issue here provide.

Further, the National Commission on Workmen's Compensation has recognized the duplication of benefits that can occur because of the numerous sources of wage replacement income, and has recommended coordination of benefits. Report of the National Commission on State Workmen's Compensation Laws (1972) at 66. The Commission recommended to the President and Congress the appropriateness of integrating workers' compensation benefits "with other benefits provided by the employer. As in the past, we believe that employers and other interested parties, such as unions should be free to develop provisions which either supplement workmen's compensation benefits or reduce retirement or disability benefits paid for by the employer in the presence of workmen's compensation benefits." *Ibid.*

The recommendation of the Interdepartmental Workers Compensation Task Force is to the same effect. In its 1977 report to the President and Congress, the Task Force also recommended against permitting employees to "double dip" by receiving both workers' compensation and retirement income. Report to the President and Congress of the Policy Group of the Interdepartmental Workers' Compensation Task Force (January 19, 1977) at 15.

Workers' compensation benefits are, at least in part, designed as wage-replacements for employees incurring a work-related disability. And, as discussed above, these benefits are "parts of a system" of employer funded wage-replacement benefits. As discussed at length in part I-A of this brief, ERISA does not mandate the duplication of these benefits. Quite the contrary, there appears to be a consensus that it represents sound social planning to coordinate these benefits. To the extent that these benefits are employer financed,[11] the Chamber submits that this represents an equitable approach for both employers and employees, and worthy of sanction by this Court.

D.

We come, then, to the final reason why this Court should leave undisturbed the integration provisions in these plans; namely, because the participants of these plans, through their duly elected representatives, collectively bargained for a total compensation package which permitted the offsets at issue here.

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[11] Workmen's compensation benefits are, of course, fully paid by the employer, and in the two cases here, the pension plans are non-contributory.

It is almost a truism that the overall scheme of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, is to provide the parties with the freedom to bargain over employment terms and conditions, and to thereby preclude the government (federal and state) from determining what those terms and conditions shall be. *Local 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976); *H. K. Porter Company* v. *NLRB,* 397 U.S. 99 (1970); *Local 24 of International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959). And, matters such as severance pay and retirement benefits are not only mandatory bargaining subjects, but also standard items in the usual collective bargaining agreement. *Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964); *Inland Steel Co.* v. *NLRB,* 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949). Thus, pension plans and their terms cannot in any sense be viewed as peripheral to the concerns of federal labor policy. They are the direct concern of that policy which requires free and unfettered bargaining as to those matters.

For all of the reasons discussed from pages 5 through 14 *supra,* ERISA does not preclude the integration of workers' compensation benefits; and, both the legislative and regulatory history countenance such offsets. Moreover, it would pervert the very spirit of the collective bargaining process to permit individual employees to reopen the bargaining process absent a showing of bad faith or failure of fair representation on the part of their union. The Chamber submits that employees should not be permitted to use the judicial process for this purpose.

In this regard, the instant cases are clearly distinguishable from *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978). In *Malone,* the Court determined that, "Congress [in the 1958 Disclosure Act which preceded ERISA] . . . recognized and preserved state authority to regulate pension plans," 435 U.S. at 505; and "[b]ecause the 1958 Disclosure Act was in effect at the time of the crucial events in [*Malone*], the expression of congressional intent therein should control." *Ibid.*

In the instant cases, of course, ERISA is controlling; and, as we shall now demonstrate, preempts the state law in issue here.

II. ERISA Preempts New Jersey's Workers' Compensation Act.

To place ERISA's preemption provision in its proper context, we first look at the provisions of both the House and Senate bills which were subsequently rejected in conference; and, second, review the purpose and scope of the substituted provision as revealed in its legislative history.

The House passed the narrowest of the three preemption proposals on February 28, 1974. Section 514 of that bill limited the federal preemption to substantive areas governed by the bill. It stated, in pertinent part,

> This title shall supercede any and all laws of the States and of political subdivisions insofar as they may now or hereafter relate to the nonforfeitability of participant's benefits in employee benefit plans . . . , the funding requirements for such plans, the adequacy of financing such plans, portability requirements for such plans, or the insurance of pension benefits under such plans.

H.R. 2, 93d Cong., 1st Sess. 7.

The Senate-passed version would have defined preemption in terms of laws relating to the subject matter governed by the bill or the Welfare and Pension Plans Disclosure Act. S.4200, 93d Cong., 1st Sess. 221.

Both these bills would have made the federal preemption applicable to state laws only insofar as they duplicated or conflicted with *ERISA* or the *Disclosure Act*. However, the provision which subsequently became law rejected that approach and redefined the scope of the provision, making it applicable to all state laws as they "relate to" *ERISA covered employee benefit plans*. Section 514(a) of ERISA states that it "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). Clearly this re-formulated provision, by its express terms, demonstrated the congressional consensus to cover the field of employee benefits in much broader fashion than previously envisioned by either House.

The remarks of several proponents of the bill and members of the Conference Committee explaining the new provision offer considerable insight, making clear that Congress "comprehended the change and intended the statute to occupy the field." *Hewlett-Packard* v. *Barnes,* 425 F. Supp. 1294, 1299, (N.D. Cal. 1977) *aff'd* 571 F.2d 502 (9th Cir. 1978), *cert. denied* 439 U.S. 831.

First, Senator Javits' comments are especially helpful since they seem to have anticipated this very case:

> Both House and Senate bills provided for preemption, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by

> the bill. Such formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

120 Cong. Rec. 29942 (1974).

Without casting aspersions on the intentions of the New Jersey Legislature, the *1977 amendment* of its Workers' Compensation Statute, which purports to relate to its non-federal workers' compensation program, must be viewed as an attempt to overrule the provisions of ERISA-covered employee benefit plans that include offset provisions, thereby unlawfully regulating those plans.

Second, Senator Harrison Williams, another champion of ERISA, and member of the Conference Committee, was unequivocal in describing the conference substitute as a provision to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of *employee benefit plans.* This principle is intended to apply in its *broadest sense* to all actions of State or local governments, or any instrumentalities thereof . . . ." 120 Cong. Rec. 29933 (1974) (emphasis added).

And Representative Dent was equally clear:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of *employee benefit plans.* With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . .

> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal Regulation of *employee benefit plans*. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

120 Cong. Rec. 29197 (1974).

The Chamber respectfully submits that it stretches the plain language of section 514(a) beyond the bounds of reason to conclude that a state statute that interferes with the method of calculating benefits provided by ERISA-covered plans is not an attempt to regulate those plans. "The legislative history manifests that Congress intended to preempt all State laws that relate to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA." *Wadsworth* v. *Whaland,* 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied* 435 U.S. 980 (1978). *See also Hewlett-Packard* v. *Barnes, supra.* "If a statute is to make sense, it must be read in the light of some assumed purpose." K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rule or Caucus About How Statutes Are to be Construed,* 3 Vand. L. Rev. 395, 400 (1950).

In this case, the Court's task is made easy. It is not necessary to "assume the legislative purpose." It has been explicitly enunciated. Congress has decreed

that, in the interest of avoiding inconsistency and conflict in employee benefit plans, state and local governments are prohibited from regulating such plans.

For these reasons, we request this Court to declare N.J.S.A. § 34:15-29 preempted for purposes of ERISA-covered plans.

CONCLUSION

For all of the foregoing reasons, Amicus Chamber of Commerce submits that the judgment of the Court below should be affirmed.

Respectfully submitted,

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January 1981

Nos. 79-1943, 80-193
(Consolidated)

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1943

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA and T. EDWARD WHITE,

Appellants,

vs.

RAYBESTOS-MANHATTAN, INC. and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-193

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

MOTION OF NATIONAL STEEL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

NOW comes National Steel Corporation hereinafter ("National") and respectfully moves the Court for leave to file a brief *Amicus Curiae* in support of the position of Appellees Raybestos-Manhattan, Inc., and Raybestos-Manhattan, Inc., Employees Retirement Plan and Respondent The General Motors Corporation.

The question before the Court which National wishes to address is whether the Employee Retirement Income Security Act of 1974 prohibits a monthly pension benefit provided under a negotiated, non-contributory pension plan from being based, in part, on the workmen's compensation benefit that may be received by a retired plan participant. Such provisions are commonly known as workmen's compensation offsets.

National, the nation's fourth largest steel company, has entered into collective bargaining agreements with the United Steelworkers of America which provide for such workmen's compensation offsets. In entering into these agreements and determining their anticipated costs National took into account the savings that would result from such offsets. Accordingly National has a direct interest in the issue to be decided by the Court and in the continuing validity of such offsets.

Additionally National is a defendant in a class action *Tolbert* v. *National Steel Corporation* (S.D. Illinois, No. 81-3003) in which the plaintiffs are challenging the validity under ERISA of the workmen's compensation offset contained in the Granite City Steel Division of National Steel Corporation—United Steelworkers of America Pension Plan.

WHEREFORE National moves this Court to allow the filing of the Brief of Amicus Curiae National Steel Cor-

poration in support of the position of Appellees and Respondent which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE NATIONAL STEEL CORPORATION

The interest of *Amicus Curiae* National Steel Corporation is described in the preceeding motion for leave to file brief as *Amicus Curiae.*

SUMMARY OF ARGUMENT

Congress' concern in enacting the anti-forfeiture provisions of ERISA was to ensure that after an employee completed a certain number of years of service with an employer he would have a vested right to receive a promised benefit. A workmen's compensation offset contained in a pension plan is an integral factor in the plan's computation and determination of benefits to which a retired employee is entitled. It does not result in a complete denial of all pension benefits and obligations determined under the terms of the plan. Rather the net effect of the offset is to provide retired employees with a total monthly benefit that is equal to the entire benefit provided under the plan. Accordingly it is not a "forfeiture" of a retirement benefit as that term is defined under ERISA.

Workmen's compensation benefits and retirement benefits paid under a pension plan serve the same purpose—to recompense an employee for his loss of earning power. If a retired employee were to receive concurrently workmen's compensation benefits and retirement benefits under a pension plan, he would be receiving duplicate benefits while only suffering one wage loss. Since workmen's compensation benefits arise from a loss of earning power and are not a means of quasi-tort recovery, the commentators and the pre-ERISA cases recognize that it would be contrary to public policy and inconsistent with the nature of workmen's compensation to prohibit workmen's compensation offsets.

Summary of Argument.

Workmen's compensation offsets do not deprive retired employees of deferred wages which they have earned. Rather an employer must take into account the cost of providing pension benefits. If a pension plan contains a workmen's compensation offset the anticipated cost of providing pension benefits is less than if the plan did not provide such benefits. The savings resulting from the presence of a workmen's compensation offset in a pension plan permits an employer to provide to all employees a greater pension benefit or a different benefit that would not have been available absent the offset. If workmen's compensation offsets are not permitted employees will receive greater than bargained for total benefits and employers will be saddled with unanticipated, burdensome costs.

ARGUMENT

The Employee Retirement Income Security Act of 1974 does not prohibit the Monthly Retirement Pension Benefit provided under a negotiated, non-contributory pension plan to be based in part on the amount of the Monthly Workmen's Compensation Benefit received by a retired employee.

I. Introduction

In 1974, Congress enacted the Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 Stat. 829, 29 U.S.C. Section 1001 et seq., ("ERISA")—a complex panoply of labor and tax laws governing this country's private pension system. Congress' purpose in enacting ERISA was (1) to establish minimum standards of fiduciary conduct for those dealing with retirement plans and (2) to improve the equitable character and soundness of private pension plans by requiring them (a) to vest the accrued benefits of employees who had significant periods of service with an employer, (b) to meet minimum standards of funding and (c) to guarantee the adequacy of the plans' assets. H.Rep. No. 533, 93 Cong., 1974 U.S. Code Cong., & Admin. News, p. 4639, 5655-5656.

The only question before the Court which will be addressed by Amicus National Steel Corporation is whether ERISA permits a monthly pension benefit provided under a negotiated, non-contributory pension plan to be based, in part, on the workmen's compensation benefit that may be received by a retired plan participant.

In the companion cases of *Buczynski* v. *The General Motors Corporation* and *Alessi* v. *Raybestos-Manhattan, Inc.*, the United States Court of Appeals for the Third

Circuit held that such workmen's compensation offsets were not prohibited by ERISA. The holding of that court was based on the validity of Treasury Regulation 1.411 (a)-4(a) (1979) which expressly authorizes workmen's compensation offsets and on the court's view that Congress did not intend to prohibit such offsets.

On November 3, 1980, the Court noted probable jurisdiction in the appeal of *Alessi* et al., and granted the petition for writ of certiorari of *Buczynski* et al., and consolidated the cases.

On January 6, 1981, the United States Court of Appeals for the Sixth Circuit decided *Utility Workers Union of America* v. *Consumers Power Company* (No. 78-1402, January 6, 1981). In that case the Sixth Circuit held that workmen's compensation offsets were a forfeiture prohibited by ERISA. The basis for the Sixth Circuit's holding was that pension benefits and social security benefits (which may be used to offset pension benefits) have the same "source of entitlement." On the other hand the Sixth Circuit reasoned that workmen's compensation benefits are paid solely because an employee has sustained an occupational injury within the course of his employment. Thus, the Sixth Circuit concluded that workmen's compensation benefits were not part of "an integrated and correlated retirement system" that could be used to offset pension benefits under ERISA.[1]

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1. Interestingly in reaching that conclusion the Sixth Circuit failed to note its prior decision in *Lofty* v. *Richardson,* 440 F.2d 114 (C.A. 6, 1971) in which it upheld the constitutionality of reducing social security disability benefits by the amount of workmen's compensation benefits received where the total received under the two programs exceeds 80 percent of previous average monthly wages.

Argument.

In this brief we will attempt not to restate the presentation of Appellants Raybestos-Manhattan, Inc., and Raybestos-Manhattan, Inc. Employee Retirement Plan and of Respondent The General Motors Corporation. We will address ourselves to certain arguments of the Appellants and Petitioners and to the opinion of the Sixth Circuit in *Utility Workers* concerning Congress' intent in adopting an anti-forfeiture provision; the nature of workmen's compensation benefits *vis-a-vis* retirement benefits; and the role of collective bargaining with respect to such benefits.

II. Workmen's Compensation Offsets Are Integral Factors In The Computation And Determination Of A Pension Plan's Benefits And Thus Are Not A Prohibited Forfeiture.

The pension plans which are the subject of this case provide, in effect, that the retirement benefit which a retired employee is entitled to receive will be reduced or offset by the amount of the workmen's compensation benefit, if any, that he receives from his former employer or on his former employer's behalf. There is no provision in ERISA which expressly prohibits such a provision. Indeed, the pertinent Treasury Regulations specifically permit such an offset as do those of the Pension Benefit Guaranty Corporation. See Treasury Regulations on Income Tax, 26 C.F.R. Section 1.411(a)—4(a); 29 C.F.R. Section 2605.2. Nevertheless the Appellants, Petitioners and United States Court of Appeals for the Sixth Circuit contend that such a provision constitutes a forfeiture prohibited by ERISA since a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into the pension plan's computation procedures. We submit, how-

ever, that this reasoning misconstrues the meaning of the term "forfeiture" and fails to recognize Congress' intent in enacting the anti-forfeiture provisions of ERISA.

Section 203(a) of ERISA and Section 411(a) of the Internal Revenue Code each require that "an employee's right to his *'normal retirement benefit'* [be] *nonforfeitable* upon the attainment of normal retirement age." (Emphasis supplied.) Each section also provides that a plan must meet certain vesting requirements under which an employee-participant must be entitled to a certain specified percentage of his "accrued benefit" after a specified number of years of service.

The terms "accrued benefit" and "normal retirement benefit" are defined in Section 3 of ERISA for purposes of Section 203(a), and they are also defined in Section 411 of the Internal Revenue Code. The term "normal retirement benefit" is defined in ERISA and the Internal Revenue Code as "the greater of the early retirement benefit under the plan or the benefit under the plan commencing at normal retirement age." "Accrued benefit" is defined in ERISA and the Internal Revenue Code in the case of a defined benefit plan (as are the plans here) as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age."

Finally the definition of the term "nonforfeitable" is contained in Section 3(19) of ERISA. That section states that the term nonforfeitable, when used with respect to a pension benefit or right—

> means a claim obtained by a participant or his beneficiary to that part of an *immediate* or *deferred*

> *benefit* under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. (Emphasis supplied.)

Thus, the term "nonforfeitable" does not apply to the manner in which benefits are to be computed. Rather these sections provide that once an employee has completed a certain number of years of service he must be entitled to receive some benefit and the benefit which he is entitled to receive cannot be taken away from him. Put simply, Congress was concerned that after several years with an employer, an employee have a *vested* right to receive a promised benefit.

Indeed, this conclusion is supported by the pertinent legislative history (S. Rep. No. 383, 93 Cong., 1974 U.S. Code Cong. & Admin. News, 4890, 4930):

> Unless an employee's rights to his accrued pension benefits are nonforfeitable, he has no assurance that he will ultimately receive a pension. *Thus, pension rights* which have slowly been stockpiled over many years *may suddenly be lost if the employee leaves or loses his job prior to retirement.*
>
> Today slightly over two thirds of the private pension plans provide some vested rights to pension benefits before retirement. However, as a general rule, employees do not acquire vested rights until they have been employed for a fairly long period with a firm or are relatively mature. Since there is no general applicable legal requirement for preretirement vesting, some plans do not offer this type of vesting at all, and among those plans which do, there is no uniformity in the vesting rules as

provided. At present, only one out of every three employees participating in employer-financed plans has a 50 percent or greater vested right to his accrued pension benefits. As a result, even employees with substantial periods of service may lose pension benefits on separation from employment. Extreme cases have been noted in which employees have lost pension rights at advanced ages as a result of being discharged shortly before they would be eligible to retire.

* * *

For reasons indicated above, the committee concluded that it is necessary and desirable to provide a minimum standard of vesting for all qualified pension plans. (Emphasis supplied.)

The pension plans in question here, like most pension plans containing workmen's compensation offsets, provide for a normal retirement benefit that takes into account any workmen's compensation benefits received by a retired employee from the employer or on its behalf. Accordingly, the workmen's compensation offset is an integral factor in the plans' computation and determination of benefits to which a retired employee is entitled. Thus, it is not a forfeiture (1) of a normal retirement benefit or (2) of an accrued benefit as those terms are defined in ERISA. Rather, the workmen's compensation offset is used to determine the amount of a participant's normal retirement benefit to be received under the plan. Calling the offset a forfeiture is irreconcilable with the fact that the offset is a factor used to determine a normal retirement benefit. Thus, we submit that the offset cannot be considered a *forfeiture* of that benefit.

The cases relied upon by Appellants (Br. 14, 15) and Petitioners (Br. 20, 21) *Winer* v. *Edison Brothers Stores Pension Plan,* 447 F. Supp. 836 (E.D. Mo., 1978); *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F. Supp. 1005 (N.D. Ohio, 1976); *Lewis* v. *Merrill Lynch Pierce Fenner & Smith,* 431 F. Supp. 271 (E.D. Pa., 1977); *Amory* v. *Boyden Associates,* 434 F. Supp. 671 (S.D. N.Y., 1976); and *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (C.A. 2, 1977) do not compel a different conclusion. These cases dealt with the validity of *denying* a participant a benefit on account of his entering the employ of a competitor rather than with the validity of *computing* a participant's normal retirement or accrued benefit. That is, they involve provisions which result in a complete denial of all pension obligations, while the provisions in question here involve the determination of the amount of the benefit to which the participant is entitled.

Thus, these cases reflect Congress' concern with employees' *vested* rights in retirement benefits not being forfeitable, rather than with the *formula* used to compute retirement benefits payable under a plan. Here, of course, the worker's right to his benefit is not disturbed by the workmen's compensation offset. Unlike the situation in the cases *supra,* where the retired employee lost his right to receive any benefit under the plan, a retired employee under the plans here receives the total benefit to which he is entitled regardless whether that benefit is paid under the plan alone or under the plan and under workmen's compensation.

The Sixth Circuit in *Utility Workers Union* (Slip. Op. 7) stated:

> If this Court were to accept the reasoning of defendants, a Company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into [sic] its pension plans' compensation procedures. Such result, however, would be contrary both to the provisions and the spirit of ERISA.

Yet our position here is not contrary to that of the Sixth Circuit with respect to the plan provisions that would deprive an employee of all the benefits due to him under the terms of a plan. Rather we only contend that an offset is not a forfeiture where, as here, it provides that the benefits payable by a plan are reduced if the retired employee receives benefits of a like kind from his employer or on his employer's behalf. Thus, where, as here, the net effect of the offset is to provide retired employees with a total monthly benefit *from an employer* that is equal to the entire benefit provided under the pension plan, it should not be considered a forfeiture.

III. The Nature Of Workmen's Compensation And Retirement Benefits Does Not Preclude Offsetting Pension Benefits Since Those Benefits Are Duplicative.

It is almost universally recognized that workmen's compensation benefits and retirement benefits paid under a pension plan serve the same purpose—to recompense an employee for his loss of earning power. Thus, if a retired employee were to receive concurrently workmen's compensation benefits and retirement benefits under a pension plan, he would be receiving a duplicate benefit while suffering only one wage loss.

Petitioners, Appellants and the Sixth Circuit fail to recognize the similar nature and purpose of such benefits. In *Utility Workers Union* the Sixth Circuit (Slip. Op. 20) quoted the District Court in that case:

> both the healthy and the maimed retirees would receive the same post-retirement income even though the burdens on the two are clearly disparate.

Even though this may be the case, we submit that it is not inequitable and that it should make no difference in determining the benefits that a retired worker will receive. Those who believe the contrary are under the mistaken belief that workmen's compensation provides for a quasi-tort recovery rather than a means of protecting against wage loss. Indeed, an analysis of the nature of workmen's compensation payments and pension retirement benefits reveals that each is designed to compensate an employee for his loss of earning power while a recovery in tort is intended to make whole those who have been wronged.

Professor Arthur Larson, who is this country's leading authority on the subject of workmen's compensation,

characterizes workmen's compensation as a wage loss protection system, similar to social security and private pensions, which, of course, are also means of protecting against wage loss. Moreover, Professor Larson recognizes that the nature and purpose of workmen's compensation differ fundamentally from damages recoverable as the result of the commission of a tort. First, the payment of workmen's compensation is dependent only upon the occurrence of a work-connected injury. Neither negligence nor fault of the employer or the employee are taken into account in determining whether an employee is entitled to payment. Second, the social philosophy behind workmen's compensation is that of providing protection and support and preventing destitution rather than righting a wrong—the concern of tort law. Third, unlike tort recoveries, under workmen's compensation the only injuries for which compensation will be received will be those producing a disability with a resulting loss in earning power. Moreover, the compensation will not restore to a claimant what he has lost. Rather, the compensation when added to the claimant's remaining earning ability will presumably enable him to exist without being a burden to others. See 1 Larson, *Workmen's Compensation Law*, §§1.00, 2.00-2.70.[2]

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2. Professor Larson's view of workmen's compensation is rooted in and supported by the cases. See e.g. *Heidler* v. *Industrial Comm'n.*, 482 P.2d 889 (Ariz. App., 1971) (Only disability from accident was sexual impotence which did not affect earning capacity. Claimant not entitled to benefits for disability, in the absence of a loss of earning capacity.); *Puffer Mercantile Co.* v. *Arellano*, 546 P.2d 481 (Colo., 1975) (Loss of testicle did not result in loss of earning capacity so that claimant not entitled to award.); *Scott* v. *C. E. Powell Coal Co.*,

For this reason Professor Larson recognizes that both workmen's compensation and retirement benefits payable under a pension plan are elements in an overall wage-loss protection system and rejects the concept that a worker should receive workmen's compensation benefits *and* retirement benefits as a result of that wage loss (4 Larson §§97.10, 97.51):

> Wage-loss legislation is designed to restore to the worker a portion, such as one-half or two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. *Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss, and in any logical system, should receive only one wage-loss benefit.* (Emphasis supplied.)

With specific respect to pension plan offsets Professor Larson states:

> Although avoidance of duplication cannct ordinarily be achieved under American statutes in these

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402 Pa. 73, 166 A.2d 31 (1960) (No recovery for loss of taste and smell.); *Fisher* v. *Consolidated Freight Wrap, Inc.*, 12 Ore. App. 417, 507 P.2d 53 (1973) (Pain and suffering not compensable unless the pain is disabling.) Thus the courts and Professor Larson have recognized that workmen's compensation payments are only to be made for the loss of earning power and that they are not the same as a recovery in tort.

> cases by, so to speak, trimming at the compensation end, it is frequently achieved by express language trimming at the private plan end, that is, by reducing the private benefits by the amount of any compensation payments. Even when the language of the plan is not specific, a court may give the benefit of the doubt to a construction that will avoid over-lapping payments . . . The implication seems to be that *duplication of benefits, even between a private pension and a compensation act, is so abhorrent to the court that the language of the pension scheme does not even "make sense" if it results in such duplication.* (Emphasis supplied.)

Various courts considering the question prior to ERISA reached this same conclusion. In *Fielder* v. *Travelers Insurance Company,* 79 Mich. App. 449, 263 N.W. 2d 9 (1977), the Michigan Court of Appeals held valid a workmen's compensation offset in a pension plan because (79 Mich. App. 452):

> The purpose of workmen's compensation is to recompense an employee for his loss of earning capacity due to a work-related injury. *Gasparick* v. *H. C. Price Construction Co.,* 399 Mich. 433, 490, 247 N.W. 2d 824 (1976). Similarly, we construe pension benefits as compensation for loss in earning capacity occasioned by the employee's ultimate retirement. Where, as here, early retirement is precipitated by a work-related injury for which the employee is receiving workmen's compensation, we find nothing offensive in a private contractual arrangement in which the employer and employee agree that the employee shall not be twice compensated for the same loss of earning capacity.

Similarly, *Mazor* v. *State of Maryland,* 279 Md. 355, 369 A.2d 82 (1977), involved a workmen's compensation offset. There, the Court of Appeals of Maryland stated (at 369 A.2d 88):

> Our holding recognizes that workmen's compensation is one facet of an overall system of wage-loss protection, and that the underlying principle of the system is to restore to the workers a portion of wages lost by physical disability, unemployment, or old age. It follows that although two or more causes of wage loss may coincide, the benefits need not be cumulative, for the worker experiences but one wage loss.

Thus, the authorities and courts have recognized that it would be contrary to public policy and inconsistent with the nature of pension benefits and workmen's compensation to prohibit workmen's compensation offsets. Indeed, if such offsets were not allowed, a retired employee might well receive combined payments from a pension plan and from workmen's compensation that exceed his pre-retirement income.[3]

Finally, in *Utility Worker's Union* the Sixth Circuit questioned (Slip. Op. 19) why a worker should seek workmen's compensation benefits if those benefits would result in an offset of his pension benefits. The question fails to recognize that often a worker will seek and receive workmen's compensation benefits before he re-

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3. See e.g. *Utility Workers Union,* Appellant's Brief p. 7, where it is stated that if the workmen's compensation offset was invalidated certain plaintiffs would receive workmen's compensation benefits and pension benefits totaling 119 percent of their pre-retirement wages.

tires. If he is partially disabled, he may continue to receive those benefits after he returns to work and after his retirement. Thus, a worker would elect to apply for workmen's compensation benefits, notwithstanding the offset, because of the immediate benefit he would receive.

Thus, we submit that the nature of workmen's compensation benefits is such that they may be properly offset against pension benefits. Whether an employee's income is reduced because of retirement or because of injury he has suffered only one wage loss and he may be compensated for that wage loss by receiving benefits from a pension plan, social security or workmen's compensation. Regardless of the source of those benefits he should be compensated only once.

IV. Disallowing The Workmen's Compensation Offsets Will Provide An Unexpected Windfall For Employees And A Costly And Unanticipated Burden For Employers.

Petitioners (Br. 32-35) and Appellants (Br. 18) go to great pains to argue that retirement benefits are wages earned during the course of employment but payable after the completion of the work career. The implication of their argument is that the workmen's compensation offset would deprive them of the deferred wages which they have earned. This argument misconceives the role that collective bargaining plays in determining the pension benefits that a retired employee is entitled to receive.

When an employer and a union enter into collective bargaining, they ultimately agree to the division of an

economic package of a certain value.[4] The form of benefits provided to employees in such a package includes wages and such fringe benefits as retirement benefits paid under a pension plan. Thus, when an employer, such as Amicus National Steel or the employers here, agrees to provide pension benefits to its workers, it must take into account the cost of providing those benefits. The *anticipated* cost of providing those benefits under a plan which contains a workmen's compensation offset reflects any savings represented by the offset which could be achieved either by way of a decreased pension liability or a decreased workmen's compensation liability. This anticipated savings results in a greater pension benefit or the provision of a different benefit that would not have been available absent the offset.[5] This fact was implicitly recognized by the Court in *Los Angeles Dept. of Power and Water* v. *Manhart* 435 U.S. 702. In discussing the effect that the allowance of a retroactive recovery would have on pension plans, the Court stated:

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4. Although this argument is addressed to the economic effect that prohibiting workmen's compensation offsets would have on employers like National Steel Corporation who adopt pension plans pursuant to a collective bargaining agreement, the economic effect would also be the same on employers who adopt pension plans outside of a collective bargaining situation.

5. Prior to the institution of the cases challenging the validity of workmen's compensation offsets, employers and unions representing employees would have had no reason to doubt the validity of such offsets. As noted, *supra,* Treasury Regulation 411(a)-4(a) specifically permits such offsets. Furthermore, in Rev. Rul. 68-243, 1968-1 C.B. 167, the Internal Revenue Service held that benefits payable under a state workmen's compensation law or an occupational disease law could be an acceptable offset against benefits payable under a qualified plan.

> These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. *The amounts set aside are determined by a painstaking assessment of the insurer's likely liability.* (Emphasis supplied.)

Thus, if workmen's compensation offsets are not permitted employees will receive greater than bargained for total benefits and employers will be saddled with unanticipated and burdensome costs. Moreover, in future years, other economic benefits provided to employees will necessarily be reduced by the added cost of disallowing workmen's compensation offsets.

V. CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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No. 80-193 and No. 79-1943

(Consolidated)

IN THE

Supreme Court of the United States

October Term, 1980

HENRY BUCZYNSKI, *et al.*,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

JOSEPH ALESSI, *et al.*,

Appellants,

v.

RAYBESTOS-MANHATTAN INC., *et al.*,

Appellees.

On Writ of Certiorari to and on Appeal from the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF STEEL COMPANIES

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Allegheny-Ludlum Industries, Inc., Armco Steel Corporation, Bethlehem Steel Corporation, Crucible Inc., Inland Steel Corporation, Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman Standard, Republic Steel Corporation, Shenango Incorporated, United States Steel Corporation and Wheeling-Pittsburgh Steel Corporation (hereinafter referred to as "Steel Companies") respectfully move the Court for leave to file a brief *amicus curiae* in support of the position of Respondent General Motors Corporation and Appellee Raybestos-Manhattan Inc.

The Steel Companies are signatories to collective bargaining agreements with the United Steelworkers of America ("Steelworkers") which contain a pension benefit computation formula providing for the integration and coordination of pension benefits with workmen's compensation benefits under certain specified circumstances. This particular feature of the Steel Companies pension plans is a longstanding practice in the steel industry. It is the result of arms length collective bargaining and it coordinates the receipt of pension benefits with other employer-funded benefits.

As signatories to such collective bargaining agreements, the Steel Companies have a direct and compelling interest in the issue presented in this case. If the Appellants and Petitioners succeed in convincing this Court that the integration of pension benefits with workmen's compensation benefits violates Section 203(a) of ERISA, this holding would effect the agreements reached between the Steel Companies and the Steelworkers which provide for such integration, as well as other integration provisions of the pension plans. The Steel Companies have a vital and continuing interest in preserving

the integrity of the pension plans established by reason of the collective bargaining agreements reached between the Steel Companies and the Steelworkers.

Further, seven of the Steel Companies are defendants in seven civil actions similar to these actions in which the United States District Court for the Western District of Pennsylvania granted summary judgment in favor of the Steel Companies on the basis of the Third Circuit's decision in *Buczynski v. General Motors*. These cases are currently pending in the United States Court of Appeals for the Third Circuit.[1] The seven Steel Companies who are defendants in those actions participated as *amicus curiae* before the United States Court of Appeals for the Third Circuit in the *Buczynski v. General Motors* case.

The decision of the United States Court of Appeals for the Third Circuit correctly recognized that a benefit

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1. In the United States Court of Appeals for the Third Circuit, these cases have been briefed and argued on a consolidated basis. *Doumont v. Shenango Inc.*, Action No. 80-1857 (3d Cir.). By letter dated December 19, 1980, the Clerk for the United States Court of Appeals for the Third Circuit advised the parties that the Court had placed these cases on *curia advisari vult* status pending this Court's decision in these cases. In the district court, the seven civil actions were as follows: *Carmen F. Gargon v. Wheeling-Pittsburgh Steel Corporation*—Civil Action No. 78-1369H (W.D. Pa.); *Wayne C. Banks v. Crucible Inc.*—Civil Action No. 78-1370H (W.D. Pa.); *Robert Milanovich v. Jones & Laughlin Steel Corporation*—Civil Action No. 78-1368H (W.D. Pa.); *Paul J. Miller v. Pullman-Standard*—Civil Action No. 78-1433H (W.D. Pa.); *George Zihol v. Mesta Machine Company*—Civil Action No. 79-344H (W.D. Pa.); *Michael E. Barna v. U. S. Steel Corporation*—Civil Action No. 78-1371H (W.D. Pa.) and *Frank E. Doumont v. Shenango Inc.*—Civil Action No. 78-1367H (W.D. Pa.).

formula providing for the integration and coordination of pension benefits with workmen's compensation benefits is a longstanding practice and that the agencies charged with regulating pension plans, both pre-ERISA and post-ERISA, have repeatedly sanctioned the propriety of such integration. If this Court determines that the Third Circuit's decision is erroneous, the reliance of the Steel Companies and the Steelworkers upon the determination of the agencies charged with administering ERISA will be frustrated and the integrity and propriety of the existing collective bargaining agreements between the Steel Companies and the Steelworkers will be subject to question.

Thus, this Court's review of the decision of the United States Court of Appeals for the Third Circuit in *Buczynski v. General Motors* directly interests the Steel Companies.

Undersigned counsel for the Steel Companies has attempted to obtain consent to the filing of this brief pursuant to Supreme Court Rule 36. Counsel for the Respondent General Motors Corporation and for Appellee Raybestos-Manhattan Inc. have given such consent but counsel for Appellants and Petitioners have indicated that they would not consent to the filing of a brief *amicus curiae* by the Steel Companies.

WHEREFORE, the Steel Companies move this Court to allow the filing of the "Brief of Steel Companies as *Amicus Curiae* in Support of the Position of Respondent General Motors Corporation and Appellee Raybestos-

Manhattan Inc.," which is submitted herein with the requisite number of printed copies.

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RAYBESTOS-MANHATTAN INC., *et al.*,
Appellees.

On Writ of Certiorari to and on Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE STEEL COMPANIES IN SUPPORT OF THE POSITION OF RESPONDENT GENERAL MOTORS CORPORATION AND APPELLEE RAYBESTOS-MANHATTEN INC.

Interest of Amicus Curiae Steel Companies

The interest of *Amicus Curiae* Steel Companies is described in the preceeding Motion For Leave To File Brief As *Amicus Curiae.*

SUMMARY OF ARGUMENT

This action raises critical and important issues concerning the freedom of parties to a collective bargaining agreement to tailor pension benefits to suit the needs of the parties and to integrate said benefits with other employer-funded benefits received by plan participants.

In this case, the United States Court of Appeals for the Third Circuit found that the provision in a pension plan benefit formula integrating the receipt of employer-funded pension benefits with employer-funded workmen's compensation benefits does not violate the minimum vesting standards of Section 203(a) of ERISA, 29 U.S.C. §1053(a).

In reviewing this determination and in analyzing the legality of integration, it should be kept in mind that a pension plan is a contract between the pension plan and the participants. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). Like any other contract, the pension contract sets forth the nature and the amount of benefits and the terms and conditions under which payment of benefits will occur. Here, the parties to a collective bargaining agreement, the companies and the unions, agreed on the establishment of pension plans with formulae for the determination and payment of benefits which included the integration and coordination of pension benefits with workmen's compensation benefits. In doing so, the companies and the unions agreed on formulae which attempted to equalize the total amount of benefits received by covered nonworking employees.

The specific provisions of the pension plans currently under attack provide for the integration of pension benefits with workmen's compensation benefits.

These provisions are part of a comprehensive scheme contained in many pension plans to coordinate the receipt of employer-funded benefits. As was explained in one of the early decisions which sanctioned the integration of pension benefits with workmen's compensation benefits as not violative of public policy:

> "What the plan actually amounted to, and no more, was a commitment by the company to see that each retired employee received a fixed amount of money monthly, to compensate partially for wages lost through inability to continue employment by reason of age, and that if such was not forthcoming in whole or in part from the specified sources, *i.e.,* public pension, other pension contributed to by the company, social security benefits, private or statutory severance pay and the like, workmen's compensation benefits from the company or any other employer or public disability pension, it would pay the computed amount or any deficiency. The scheme had no particular relation to compensation benefits. Its scope was much broader and the theory an infinitely deeper one." *Renshaw v. U.S. Pipe and Foundry Co.,* 153 A.2d 673, 678 (N.J. Sup. Ct. 1959).

One prominent commentator in the field of workmen's compensation law has described the necessity for coordination of benefits as follows:

> "97.10 *Impropriety of duplicate benefits*
>
> Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemploy-

ment, and old age. The crucial operative fact is that of wage-loss; the cause of the wage-loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage-loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage-loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workmen's compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grab-bag of assorted unrelated benefits." 4A. Larson, *The Law of Workmen's Compensation* §97.10 (1980).

In challenging the right of the parties to establish the amount of benefit through a formula which integrates pension benefits with workmen's compensation benefits, Appellants and Petitioners argue that the enactment of minimum vesting standards in Section 203(a) of ERISA foreclosed the parties to a collective bargaining agreement from integrating benefits. In doing so, Appellants and Petitioners confuse the concept of vesting with the process of benefit definition under a pension plan. The minimum vesting standards of ERISA cannot and should not be amalgamated with the concept of benefit definition. These are separate and distinct concepts. Vesting assures that, after a certain period of employment, employees receive that which was promised under the plan. It cannot and does not alter the promise of benefit which was made. Here the prom-

ise that was made was to provide a pension benefit which included integration with workmen's compensation. The minimum vesting standards cannot be read to impose additional contractual obligations upon an employer to which that employer never agreed. Vesting governs the employee's right to a pension but does not define the amount of the benefit.

As will be discussed *infra,* in failing to recognize the separate nature of vesting and benefit definition, Appellants and Petitioners would extend ERISA into an area which Congress reserved as the prerogative of the parties establishing a pension plan, *i.e.,* to establish the level of benefit which will be provided by the pension plan.

ARGUMENT

There are an infinite variety of formulae by which benefits can be determined under a pension plan. Certain formulae such as that which is at issue here take into consideration benefits from other sources which are financed in whole or in part by the pension plan sponsor. Integration of pension plan benefits with these other benefits is a function of the benefit definition process under the plan. Subject to certain limits applicable to integration with Social Security benefits,[2] integration of plan benefits with other benefits was permissible under pre-ERISA law and remains permissible under ERISA. Integration has not been explicitly or implicitly barred by ERISA's minimum standards relating to the separate

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2. See Section 206(b) of ERISA, 29 U.S.C. §1056 (b).

concept of vesting and remains, as prior to ERISA, a question of benefit definition.

1. Integration Of Pension Benefits With Workmen's Compensation Benefits Is Not Prohibited by Section 203(a) Of ERISA.

The Appellants and Petitioners maintain that ERISA changed prior law by establishing that the integration of pension plan benefits with workmen's compensation benefits operates as a forfeiture in violation of ERISA's minimum vesting standards, Section 203(a) of ERISA, 29 U.S.C. §1053(a).

On its face, Section 203(a) does not set forth any particular definition of benefits nor restrict the way in which benefits may be defined. Section 203(a) merely requires that after a certain period of service an employee's right to a pension cannot be lost even though his employment may be terminated. This is in accordance with the concept of vesting as it existed historically and as it was carried forward under ERISA.[3] Vesting is essentially a timing requirement; it establishes the time

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3. One noted authority explained the concept as follows:

> "In the context of a pension plan, vesting refers to the right of a participant to receive his accrued pension benefits at normal or early retirement whether or not he is in the service of the employer at that time. It is a more narrow concept than the strict legal concept of a vested right, since the right to a pension is contingent upon the employee's survival to the earliest date on which he can validly claim a pension. Thus, a vested pension benefit is terminated by the participant's death prior to normal or early retirement. The vesting of a benefit simply removes the obligation of the participant to remain in the plan until the date of early or normal retire-

after which there will be a right to a benefit without continued employment.[4]

This concept of vesting was recently confirmed by this Court when, in describing the term "nonforfeitable" as defined in ERISA, the Court, through Justice Stevens, noted as follows:

> ". . . the principal subject of the definition is the word 'claim'; it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.' . . . the term 'forfeiture' normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in §203(a)(3) [the exceptions to §203] . . . describes an event—such as death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of 'nonforfeitable' to view it as describing the quality of the participant's

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ment." D. M. McGill, *Fundamentals of Private Pensions* (3d ed. 1975) at p. 130.

See also, G. B. Buck, Jr., "Features of Present-Day Plans," *Pension and Profit Sharing* (2d ed. 1956) at p. 27.

4. *See, Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, at 377-78 and n.27 (1980). This is confirmed by ERISA's definition of nonforfeitable as a "*claim* obtained by a participant or his beneficiary to that part of an immediate or deferred benefit *under a pension plan* which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." Section 3(19) of ERISA, 29 U.S.C. §1002(19). [Emphasis added.]

right to a pension rather than a limit on the amount he may collect." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. at 371-73 (1980).

Thus, the existence of a right to a pension does not determine what that benefit will be. In utilizing integration, the company and the union have not caused a participant to forfeit his right to a pension because, if his or her pension payments would exceed the amount of workmen's compensation payments, the plan participant receives the excess.[5] Similarly, if the amount of workmen's compensation ceases or is diminished, the plan participant's pension benefits will correspondingly increase.[6] Thus, the plan participant's vested rights are not lost by the integration provision.

In challenging integration, Appellants and Petitioners mistakenly rely upon decisions in which an employee loses his or her right to a pension because of prohibited conduct. These decisions involve a total loss of the right to a pension regardless of the amount of that pension or how it is computed.[7] As such, it is not surprising that such a loss of a right to a pension has been held to be a

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5. This is, in fact, what happened in the case selected by the parties to be representative of the seven cases filed in the United States District Court for the Western District of Pennsylvania. See Stipulation dated July 2, 1979 in *Gargon v. Wheeling-Pittsburgh Steel Corp.*, Civil Action No. 78-1369H (W.D. Pa.)

6. This happens when a state workmen's compensation statute provides for benefits which have specific limitations, either monetary or temporal, or when an employee recovers from the disabling condition.

7. Appellants and Petitioners cite a number of decisions which have held it a prohibited forfeiture for an employee to be deprived of his right to a pension when he works for a competitor. *Riley v. MEBA Pension Trust,*

prohibited forfeiture. However, the strictures of ERISA prohibiting the loss of vested rights cannot be used to impose the payment of a particular level of benefits.

The right or claim which is vested under the plan is a right by the plan participant to receive "his normal retirement benefit." See Section 203(a). Section 3(22) of ERISA, 29 U.S.C. §1002(22), defines "normal retirement benefit" as the benefit determined "under the plan." Although the right or claim becomes vested, one still must determine the benefit *under the plan* to which that right attaches. Thus, ERISA recognizes the separate and distinct nature of vesting and benefit definition.

In challenging the concept of integration, Appellants and Petitioners ignore the fact that it is the *claim* to a benefit which is nonforfeitable. The benefits to which the claim applies must be determined according to the formula set forth in the plan. Instead, Appellants and Petitioners erroneously argue that, because their *claim* is nonforfeitable, they are entitled to have their benefit determined without reference to the terms of the plan which provides that the amount of pension benefits that are to be paid are to be integrated.

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570 F.2d 406 (2d Cir. 1977); *Keller v. Graphic Systems of Akron, Inc., Employees Profit Sharing Plan,* 422 F. Supp. 1005 (N.D. Ohio 1976); *Lewis v. Merrill, Lynch, Pierce Fenner & Smith,* 431 F. Supp. 271 (E.D. Pa. 1977); *Amory v. Boyden Associates, Inc.,* 434 F. Supp. 671 (S.D.N.Y. 1976). Appellants and Petitioners also rely upon certain "bad boy" cases in which an employee who engages in certain prohibited conduct is deprived of his pension. *Winer v. Edison Bros. Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979); *Fremont v. McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979) *cert. denied,* 100 S. Ct. 1599 (1980). In these cases, the employee has lost his right to any pension because of the prohibited conduct.

Argument.

In order to make this argument, Appellants and Petitioners must assume that any plan formula that requires a mathematical subtraction in a benefit computation results in a forfeiture. From this assumption, they argue that all forfeitures are prohibited by Section 203(a) of ERISA unless specifically exempted in Section 203(a)(3). Because workmen's compensation integration is not listed in Section 203(a)(3), they argue that such integration is prohibited.

The defect in this line of reasoning is that Appellants and Petitioners never adequately explain why this Court should assume that all reductions or subtractions in a benefit formula are necessarily forfeitures. In considering this assumption, the United States Court of Appeals for the Third Circuit carefully examined and correctly rejected the argument that benefit formula reductions are necessarily forfeitures. In doing so, the Third Circuit noted correctly that other sections of ERISA clearly recognize that benefit formula reductions are not necessarily forfeitures and that the governmental agencies charged with issuing regulations concerning ERISA have determined that integration is permissible under the statute.

In rejecting Appellants' and Petitioners' argument that benefit formula reductions are necessarily forfeitures, the United States Court of Appeals for the Third Circuit in *Buczynski v. General Motors Corp.*, 616 F.2d 1238 (3d Cir. 1980) carefully examined the statute to determine whether, as Appellants and Petitioners suggest, Section 203 was intended by Congress to prohibit any formula which provides a reduction or subtraction in computing the benefit to be paid. In Section 206(b) of ERISA, 29 U.S.C. §1056(b), Congress recognized that Social Security and Railroad Retirement benefits could

be integrated with pension payments but that future increases in Social Security and Railroad Retirement benefits could not be integrated.[8] If, as Petitioners and Appellants argue, all benefit formulae reductions constitute forfeitures, then Congress' enactment of Section 206(b) would be superfluous because all Social Security integration would be prohibited by Section 203(a). This indicates that Congress did not intend integration to be a forfeiture within the scope of Section 203. Thus, vested pension rights are exactly that, *i.e.*, a right to the benefit provided by the formula set forth in the plan, and not a right to receive specific amounts over and above that which is set forth in the plan.

Appellants and Petitioners argue that, after they have become entitled to a benefit by reason of retirement, the subsequent award of workmen's compensation benefits causes a reduction in the benefit being paid and that this is a forfeiture. The error in this argument is that a pension plan that is integrated contains, in effect, two basic benefit formulae, one for persons who have a compensable injury at the time of retirement and one for persons who do not. The determination of the class to which an individual retiree belongs, however, cannot be made until some time after the actual retirement of the individual due to the delay in processing workmen's compensation claims. It is important to recognize that the retiree was actually entitled to workmen's compensation at the time he retired. He therefore should never have received a benefit based upon a formula that did not

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8. It should be noted that the Social Security benefits which can be integrated under ERISA can include benefits payable for disabilities. See 42 U.S.C. §423. There is no meaningful difference between such disability benefits and workmen's compensation benefits.

integrate and coordinate with workmen's compensation benefits. The subsequent commencement of integration merely corrects the error made in misclassifying the retiree at the time of his retirement. This does not constitute a forfeiture.

In addition to reliance upon the carefully crafted statutory scheme which recognizes the separate nature of vesting and benefit definition, the Third Circuit also relied upon the explicit approval of workmen's compensation integration by the regulatory agency charged by Congress with issuing regulations concerning minimum vesting standards.[9] The Secretary of the Treasury has defined "nonforfeitable" to indicate that the benefit formula reductions pursuant to an integration provision in a plan does not result in a forfeiture.

> ". . . nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits." Treas. Reg. §1.411(a)-4, adopted August 22, 1977 by T.D. 7501.

In this regulation, the Secretary of the Treasury clearly recognized that integration of plan benefits, including

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9. Section 203 of ERISA, which is contained in Title I of ERISA, has a parallel provision in Title II of ERISA. See Section 1012 of ERISA, adding Section 411 to the Internal Revenue Code, 26 U.S.C. §411. Pursuant to Section 3002(c) of ERISA, 29 U.S.C. §1202(c), the regulations of the Secretary of the Treasury concerning Section 411 are also binding insofar as they involve the minimum vesting standards of Title I of ERISA, *i.e.*, Section 203.

integration with workmen's compensation, is part of the definition of benefits under a plan and not a forfeiture of a previously vested right. Because this is the agency charged with interpreting Section 203, it is entitled to great deference by this Court. *Bingler v. Johnson,* 394 U.S. 741, 749-751 (1969); *see also, Udall v. Tallman,* 380 U.S. 1, 16 (1965). As a legislative regulation, the Secretary of the Treasury's determination can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Batterton v. Francis,* 432 U.S. 416, at 424-26 (1977); *General Motors Corp. v. Buha,* 623 F.2d 455 (6th Cir. 1980); *Baker v. Otis Elevator,* 609 F.2d 686 (3d Cir. 1979).

Similarly, the Pension Benefit Guaranty Corporation ("PBGC"), an autonomous corporation established within the Department of Labor by Title IV of ERISA to guarantee the payment of nonforfeitable benefits to participants of terminated plans, has recognized that integration with workmen's compensation does not result in a forfeiture. PBGC has described the type of nonforfeitable benefits which it will guarantee as follows:

> " 'Pension benefit' means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves or has permanently let (sic) covered employment, or to a surviving beneficiary, which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient." 29 C.F.R. §2605.2 (1980).

Moreover, beyond the statute and the Secretary of the Treasury's and PBGC's specific regulations on the

subject, an understanding of the nature of vesting makes obvious that the integration of workmen's compensation benefits in the definition of the pension benefit to which a participant is entitled is not a forfeiture of vested rights. One cannot forfeit the right to something one never had. Vesting operates with respect to the right to receive benefits due and payable *under the plan*. Under an integrated formula there is never a right to receive a benefit determined without regard to integration.

Integration is part of the plan's benefit formula, *i.e.*, the determination of the amount of benefit, and not something applied after a participant's benefits have been ultimately determined. At any time of reference the integration provision applies, *i.e.*, the benefit is always subject to integration with workmen's compensation. The timing of when the affected participant applies for and actually receives workmen's compensation merely establishes the point in time when the integration part of the plan benefit formula becomes operative. No taking away or "forfeiture" of benefits occurs, since there never was an entitlement to receive a benefit determined without regard to workmen's compensation. To assume that by reason of the integration of workmen's compensation in the determination of a plan benefit a forfeiture has occurred is to begin at the wrong end. The real beginning point is to ask what the plan has promised the participant in terms of a benefit. The plan is giving a benefit determined by reference to, *inter alia,* workmen's compensation. This is the benefit which has "accrued" and with respect to which the participant's rights are nonforfeitable at his or her normal retirement date.

In a recent decision, the United States Court of Appeals for the Sixth Circuit confused a forfeiture of a

right with the operation of integration. *Utility Workers Union v. Consumers Power Co.*, Pens. Rep. No. 325 (BNA) D-1 (6th Cir. Jan. 6, 1981), *petition for recon. en banc pending*. Without even addressing the reasoning of the Third Circuit in *Buczynski*,[10] Judge Peck in *Utility Workers* reasoned that the "central question presented on appeal" was "Are worker's compensation benefits and social security benefits 'like' benefits for purposes of ERISA?" Pens. Rep. No. 325 (BNA) at D-4. This is not the central question.

Rather, the inquiry must be whether Section 203(a) of ERISA forbids workmen's compensation integration. The significance of the explicit approval of Social Security integration in ERISA is not, as Judge Peck argues in his opinion in *Utility Workers*, that Congress impliedly intended to exempt "like" benefits from the reach of Section 203(a). Actually, the point is that Congress did not need to exempt Social Security integration under Section 203(a)(3) because it did not intend to treat all mathematical reductions in plan benefit formula as forfeitures. As noted by Judge Garth in *Buczynski*, 616 F.2d at 1246-1247, the lack of an exemption for Social Security integration indicates that Congress never intended integration to be a forfeiture.

The decision in *Utility Workers* also places great reliance upon the fact that pension and Social Security benefits "are earned on account of years of service" and

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10. This was noted by Judge Engel in his dissenting opinion in *Utility Workers* where he stated that "the majority opinion fails to refute the reasoning of Judge Garth and his recognition that workmen's compensation is in very real measure much like social security in the breadth of its coverage. *See Buczynski v. General Motors Corp., supra*, 616 F.2d at 1246-47." Pens. Rep. No. 325 (BNA) at D-6.

that workmen's compensation benefits are not. This line of reasoning ignores the fact that pension plans can and do provide benefits regardless of years of service. For example, pension plans can define the benefit as a percentage of wages received in the last years of service. Further, the vesting standards of ERISA are minimum standards. A plan can provide vesting earlier than that required by ERISA, even for that matter when employment commences. Frequently, for example, the disability features of a pension plan are made available to employees prior to the minimum number of years for vesting set forth in Section 203. Thus, it is erroneous to suggest that these benefits are different because pension payments are derived from years of service and workmen's compensation payments are not. More importantly, all of these benefits are derived from a common source, the employment relationship. It is the employment relationship which gives rise to the right to benefits.

The analysis of the Sixth Circuit in *Utility Workers* is subject to yet another defect. The Sixth Circuit, following the Third Circuit in *Buczynski,* recognized that Treas. Reg. §1.411(a)-4 was a valid regulation. It claimed, however, that the revenue rulings which applied the principles of this regulation to the workmen's compensation offset provisions were incorrect interpretations of this regulation. In so doing, the Sixth Circuit mistakenly concluded that it, rather than the Treasury Department, was in a better position to interpret Regulation §1.411(a)-4. Moreover, in finding inconsistency between the regulation and the revenue rulings, the Sixth Circuit totally ignored the section of the regulation which specifically authorized integration of *all* federal and state statutory benefits:

> ". . . nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act *or under any other Federal or State law* and which are taken into account in determining plan benefits." Treas. Reg. §1.411(a)-4. [Emphasis added.]

It is difficult to see how the revenue rulings permitting integration of pension benefits with workmen's compensation benefits are inconsistent with the above-quoted language which clearly includes workmen's compensation laws.

In reviewing the *Utility Workers* decision carefully, it would appear that the real reason for Judge Peck's decision is his perception that, if workmen's compensation integration is sanctioned, there will be a potential for abuse (Pens. Rep. No. 325 (BNA) at D-2) and that it would be inequitable for an injured and a non-injured worker to receive the same combined workmen's compensation and pension payments (Pens. Rep. No. 325 (BNA) at D-5-D-6). In expressing these concerns, Judge Peck ignores the fact that in that case, as well as in the case before this Court, the workmen's compensation integration provision is the result of collective bargaining and that the Secretary of the Treasury has determined that "[o]nly those programs which provide benefits that may be provided under a qualified pension plan may be used as an offset since only then could a correlated retirement system exist."[11] Judge Peck also ignores the obvious realities of the situation in that integration permits a higher level of integrated benefits to all employees at the same cost to the employer. Because the plan is a

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11. See Rev. Rul. 78-178, 1978-1 C.B. 117.

product of collective bargaining, a union should be able to agree that pension payments can be directed to those employees who do not receive similar payments from other sources. *See, Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). It is the parties to collective bargaining who are best able to tailor the type and amount of benefits which are best suited to their needs.[12] Misguided judicial notions of "fairness" cannot obscure the fact that Congress never intended to regulate the level of benefits to be provided under a plan.

While Section 203 of ERISA does require that certain rights be vested after certain periods of time, nothing in ERISA regulates the level of benefits to be provided. Analytically, integration is no different than the establishment of the level of benefits to be provided in the first place.[13]

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12. Judge Peck's concern for the inequity of a healthy and an injured employee receiving the same combined pension and workmen's compensation benefits also ignores the fact that, as a result of the collectively bargained package of benefits, an employer and a union can agree to provide other benefits for injured workers such as, for example, disability insurance and/or medical benefits.

13. Appellants and Petitioners, and those filing *amicus curiae* briefs on their behalf, repeatedly suggest that pension payments are a form of deferred compensation. While this is true in the sense that the creation and funding of the pension plan is part of the agreement between the company and the union and pension payments are not received by the employees at the time they are rendering services to the employer, the concept of deferred compensation cannot be stretched to the lengths suggested by Appellants and Petitioners. Unlike wages, pension plans have an insurance aspect in that they provide for the payment of certain benefits upon the happening of certain events, such as the fulfillment of particular lengths of service with the employer or

2. Integration Was A Function Of Benefit Definition Prior To ERISA And Was Then And Is Now Clearly Legal.

Prior to the enactment of ERISA, integration as part of the benefit definition process was well-recognized and accepted. The main area of concern in which integration was examined was the integration of pension benefits with Social Security benefits. Under pre-ERISA law, there were minimum standards for the integration of pension plan benefits with Social Security benefits to achieve favorable federal income tax treatment.[14] Indeed, integration of pension plan benefits with Social Security benefits began with the enactment of the nondiscrimination rules under the Revenue Act of 1942.[15]

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the occurrence of an occupational disease or disability. If a plan can provide for the payment of benefits under certain conditions and upon certain terms, it follows logically that a plan can integrate benefits.

14. Of interest to the question presented here concerning integration of pension payments with workmen's compensation benefits are the decisions in *Richardson v. Belcher,* 404 U.S. 78 (1971) and *Lofty v. Richardson,* 440 F.2d 1144 (6th Cir. 1971), *cert. denied,* 404 U.S. 985 (1971) in which this Court and the Sixth Circuit upheld an offset of Social Security benefits for workmen's compensation payments. The provision of the Social Securities Act requiring the offset of workmen's compensation benefits is still in effect. See 42 U.S.C. §424a. This offset is in principle equivalent to that involved here. The Supreme Court in *Richardson v. Belcher* cited and relied upon legislative history indicating Congress' concern for the necessity to avoid overlapping of benefits. 404 U.S. at 82.

15. Section 162 of the Revenue Act of 1942, Pub.L. No. 753, ch. 619, 56 Stat. 798, amended Section 165 of the Internal Revenue Code of 1939 to establish standards whereby qualified pension plans could be designed to

From the very first pronouncements on the subject by the Internal Revenue Service, integration was treated as a function of benefit definition and benefit accrual, not as a function of vesting.[16]

The separate nature of vesting and benefit definition was the rationale of a widely cited decision on the integration of pension plan benefits with Social Security benefits which recognized the legality of such integration. *Hurd v. Illinois Bell Telephone Co.*, 136 F.Supp. 125 (N.D. Ill. 1955), *aff'd*, 234 F.2d 942 (7th Cir. 1956), *cert. denied sub nom. Seybold v. Western Electric Co.*, 352 U.S. 918, *reh. denied sub nom. Seybold v. Western Electric Co.*, 352 U.S. 977 (1957). In affirming the district court, the United States Court of Appeals for the Seventh Circuit specifically rejected plaintiff's claim of a vested right to benefits exclusive of the pension plan provision integrating pension plan benefits with Social Security benefits:

> "The first major contention of plaintiffs largely depends upon just what the right is which vests in an employee upon his retirement in accord with the plan. Such an employee receives only a right to receive a monthly pension, not in a specified amount,

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supplement Social Security benefits as long as the plan was not discriminatory in favor of certain persons such as officers and shareholders. H. R. Rep. No. 2333, 77th Cong., 2d Sess. (1942) at 103-104; S. Rep. No. 1631, 77th Cong., 2d Sess. (1942) at 137. The reason that Congress had to address integration with Social Security was that, should a plan integrate with Social Security, the plan would provide greater benefits to the higher paid, which, absent action by Congress, could have made such plans discriminatory under the newly-enacted law.

16. Internal Revenue Service Mimeograph 5539, 1943 C.B. 499.

> but in an amount computed in accord with the provisions and conditions of the whole contract." 234 F.2d at 946.

Thus, the Court recognized that an employee had no vested right to pension plan benefits in an amount over and above that set forth in the plan instrument which included integration. The same rationale applies here.

Further, prior to ERISA's passage, the Internal Revenue Service had had in effect for some time Treas. Reg. §1.401-3(e)(2) which expressly dealt with the integration of pension plan benefits with Social Security benefits.[17] In Rev. Rul. 71-446, 1971-2 C.B. 187, the Service interpreted Treas. Reg. §1.401-3(e)(2) and set forth approved methods of integration of pension plan benefits with Social Security benefits.[18]

In addition to the preceding, and contrary to the suggestion of Appellants and Petitioners that the enactment of ERISA in 1974 initiated vesting, limited vesting requirements existed under administrative pronouncements by the Internal Revenue Service prior to ERISA.

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17. Adopted September 24, 1956 by T.D. 6203 and amended January 21, 1960 by T.D. 6447, September 16, 1963 by T.D. 6675, November 12, 1968 by T.D. 6982 and July 21, 1971 by T.D. 7134.

18. Rev. Rul. 71-446, *supra,* has been continued in effect (with minor modifications not here relevant) since ERISA's enactment. Rev. Rul. 75-480, 1975-2 C.B. 131; Rev. Rul. 76-76, 1976-1 C.B. 106; Rev. Rul. 78-92, 1978-1 C.B. 118. This is significant since the separate vesting and benefit accrual rules of Title I of ERISA, Sections 203 and 204, 29 U.S.C. §1053 and 1054, were also added in substantially identical terms to the qualification requirements in Title II of ERISA in new Sections 411(a) and (b) of the Code, 26 U.S.C. §411(a) and (b).

These pronouncements covered the subject of discrimination within the meaning of the Internal Revenue Code, and, while such discrimination is not an issue in this case, the pronouncements never considered integration of a plan benefit formula to cause a forfeiture with respect to then extant vesting requirements.[19] This is because integration was regarded as part of benefit definition and not vesting.[20] Vesting was a separate concept and operated wholly apart from the determination of the benefit amount which determination was pursuant to the plan benefit formula, integrated or not.

ERISA, a statute of minimum standards, carries forward these rules on integration of pension plan benefits with Social Security benefits.[21] As described *infra,* ERISA and particularly Section 203(a) set no minimum

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19. In Rev. Rul. 68-243, 1968-1 C.B. 157, the Service ruled that pension plan benefits were not discriminatory simply because they are integrated with workmen's compensation. This was without regard to the plan vesting schedule, if any.

20. In Rev. Rul. 70-371, 1970-2 C.B. 85, the Service permitted integration of an amount contributed to a profit-sharing plan by the same employer to its concurrent pension plan. However, in Rev. Rul. 69-502, 1969-2 C.B. 89, the Service had taken the position that a pension plan could not qualify under the federal income tax law if it was integrated with the same employer's profit-sharing plan by means of a benefit offset. After ERISA, the Service issued Rev. Rul. 76-259, 1976-2 C.B. 111, superseding Rev. Rul. 69-502, *supra,* holding *inter alia* that such integration was permissible and announcing that the regulation which Rev. Rul. 69-502 had been interpreting would be modified to allow a broader scope for permissible integration.

21. See Section 206(b) of ERISA, 29 U.S.C. §1056(b) and I.R.C. §401(a)(5), 26 U.S.C. §401(a)(5).

standards for other forms of benefit formula integration, including integration with workmen's compensation.

3. The Legislative History of ERISA Indicates That Congress Continued In Effect Prior Law Concerning Integration.

In examining the legislative history of ERISA, one finds that Congress recognized and continued in effect under ERISA the concepts of vesting, benefit definition and benefit accrual as they existed in prior law. As discussed *supra,* the concept of vesting existed prior to ERISA to establish the point in time after which there was a right to a benefit without continued employment. The legislative history reveals that, in enacting Section 203(a) of ERISA (minimum vesting standards), all Congress intended was to accelerate the point in time at which vesting occurred by establishing minimum time schedules for vesting and rules for the crediting of service[22] and by eliminating forfeitures of previously vested rights by reason of noncompetition clauses and so-called "bad boy" clauses.[23]

Congress did not need to speak of the integration of pension plan benefits, including integration with work-

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22. H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) at 267-273; H.R. Rep. No. 93-779, 93d Cong., 2d Sess. (1974) at 18-19, 51-59; H.R. Rep. No. 93-533, 93d Cong., 1st Sess. (1973) at 5-6; H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974) at 53-60; S. Rep. No. 93-383, 93d Cong., 1st Sess. (1973) at 44-50; S. Rep. No. 93-127, 93d Cong., 1st Sess. (1973) at 20-21, 39.

23. H.R. Rep. No. 93-779, 93d Cong., 2d Sess. (1974) at 59; H.R. 93-807, 93d Cong., 2d Sess. (1974) at 60; S. Rep. No. 93-383, 93d Cong., 1st Sess. (1973) at 49-50.

men's compensation benefits, under the vesting rules because Congress knew that it was general knowledge, law and practice in the area of private pensions that the integration of pension plan benefits with other benefits was a function of benefit definition. Congress addressed benefit integration in the accrual and benefit definition sections of ERISA and not in the minimum vesting section.[24]

Nowhere in the legislative history of ERISA does Congress speak of eliminating integration in general, or integration with workmen's compensation in particular, as a minimum standard under ERISA. Congress expressly considered the question of the extent of integration of pension plan benefits with Social Security benefits during its consideration of the various bills which were eventually to become ERISA. Except for establishing certain minimum standards for integration of pension benefits with Social Security benefits, Congress decided to defer more comprehensive changes for further study.[25] In addition to the provisions in ERISA which ban the reduction of accrued benefits of retired or terminated participants by reason of subsequent increases in Social Security benefits,[26] the bill as reported

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24. See Section 204(b)(1)(A), (B)(iv) and (C), 29 U.S.C. §1054(b)(1)(A), (B)(iv) and (C), and Section 206(b), 29 U.S.C. §1056(b).

25. *E.g.* H.R. Rep. No. 93-779, 93d Cong., 2d Sess. (1974) at 28-29, 67-68; H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974) at p. 29 and 69.

26. Section 206(b) of ERISA, 29 U.S.C. §1056(b).

by the Conference Committee actually contained a provision[27] which would have frozen integration of plan

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27. "REQUIREMENT OF NO FURTHER SOCIAL SECURITY INTERGRATION IN EXCESS OF CERTAIN LIMITS.—

(1) A pension, profit-sharing, or stock bonus plan shall be treated as not meeting the requirements of section 401(a)(3)(B) or (4) of the Internal Revenue Code of 1954, or section 401(d)(6) of such Code (or, after the effective date of the amendments made by section 1016 of this Act, section 401(a)(3), section 401(a)(4), section 401(d)(6), or section 410 of such Code) if it does not meet the requirements of Revenue Ruling 71-446 without taking into account any amendment made to title II of the Social Security Act after December 31, 1971.

(2) Paragraph (1) shall not apply to any plan which met the requirements of such revenue ruling on June 27, 1974, unless—

(A) the plan is amended after that date to take into account a greater level of benefits or a greater wage base under such title II, or

(B) such plan takes into account a greater level of benefits or a greater wage base than that in effect under such title on June 27, 1974 (and, for purposes of this subparagraph, the level of benefits is determined without regard to any increase therein under section 215 of the Social Security Act after that date, and the wage base is determined without regard to any increase therein under section 230 of that Act).

If it is necessary to amend the plan in order for the provisions of subparagraph (B) not to apply to it, a plan will be treated as a plan not described in subparagraph (B) if the necessary amendment is made not later than June 30, 1975, and applies to the period beginning on January 1, 1975.

(3) This subsection takes effect on the date of enactment of this Act and ceases to be effective on July 1, 1976."

H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974) at 131-132.

benefits with Social Security benefits at 1971 levels for two years pending further Congressional study of the question.[28] Congress deleted this freeze in integration levels from the final legislation by means of a joint resolution of Congress[29] because there was serious doubt as to its cost impact on private pensions.[30] What Congress intended was to adjust the permissible level of Social Security integration without regard to the new vesting rule which it was imposing. One must infer from this that Congress surely did note equate integration with a forfeiture. Thus, to construe Section 203(a) as barring all forms of integration is to bring about a result clearly not intended by Congress.

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28. *Ibid.*, at 280-281. It should be noted that, even in this proposal to regulate integration which was later deleted, Congress did not treat integration as having anything to do with the minimum vesting standards which it was imposing. See Section 1012 of ERISA, adding Section 411 to the Internal Revenue Code, 26 U.S.C. §411, which is the Title II counterpart to Section 203. Rather, the proposal was to amend the non-discrimination rules embodied in Section 401 of the Code, 26 U.S.C. §401. Similarly, in banning the integration of future increases in Social Security and Railroad Retirement benefits, Congress embodied these requirements in Section 206 of ERISA, 29 U.S.C. §1056, relating to the form and payment of benefits, not in any of the vesting requirements. This is further evidence that Congress recognized the separate nature of vesting and benefit definition.

29. H.R. Con. Res. 609, reproduced in Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (1974), *Legislative History of Employee Retirement Income Security Act of 1974*, at 4722-4730. See section 2(17) at 4727.

30. *Ibid.*, at 4732 (remarks of Senator Williams).

Further, prior to and following the enactment of ERISA in 1974, the Secretary of the Treasury had non-discrimination rules for the qualification of a plan for favorable tax treatment. In Rev. Rul. 68-243, 1968-1 C.B. 157, the Secretary recognized that pension benefits were not discriminatory simply because they were integrated with workmen's compensation. In enacting ERISA, Congress stated that it was aware of these existing anti-discrimination rules and that the Secretary's anti-discrimination rules were not to be changed. In the Conference Committee Report accompanying ERISA, the Conference Committee noted as follows:

> "Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) at 277.

It should be noted that these non-discrimination rules have been reaffirmed by the Secretary following the enactment of ERISA. See Rev. Rul. 78-178, 1978-1 C.B. 117.

Similarly, the legislative history of ERISA indicates that Congress intended the minimum vesting rules which it was adopting to apply to benefits accrued prior to the effective date of ERISA.[31] Thus, an employee with ac-

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31. H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) at 275; see also S. Rep. No. 93-383, 1st Sess. (1973) at 21.

crued benefits based upon pre-1974 service would become vested if he had the minimum number of years set forth in Section 203. Under Appellants' and Petitioners' line of reasoning, such an employee would not only have his right to a pension vested but also would be entitled to his pension without the use of integration *i.e.,* his accrued benefit would be increased. This would happen even though the parties had specifically agreed upon an integrated benefit and the funding obligations of the plan sponsor had been determined on the basis of an integrated formula. Yet, in the thousands of pages of legislative history of ERISA, Congress never indicated that it intended the minimum vesting standards to alter the amount of pension to be received. Indeed, in considering Social Security integration, Congress was very careful to avoid imposing increased costs upon pension plans:

> "... your committee is very much aware that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the rate of growth of private retirement plans." H.R. Rep. No. 93-779, 93d Cong. 2d Sess. (1974) at 29; *See also, Id.* at 67-68; H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974) at 29 and 69.

To accept Appellants' and Petitioners' argument will necessarily mean that pension costs will be increased. In explicitly dealing with Social Security integration, Congress refused to impose such additional costs without further study. Congress surely did not implicitly impose such costs—by impliedly prohibiting workmen's compensation integration.

CONCLUSION

The basic purpose of ERISA is to establish minimum standards for private pension plans to assure that employees receive that which is promised by their employer concerning their pension. ERISA does not tell an employer what that promise must be or even require any promise in the first place.

The minimum standards of ERISA concerning vesting assure that, after certain periods of employment, an employee's right becomes vested in the pension that was promised him regardless of whether or not he continues in employment. The amount and type of benefits which are to be paid are set forth in the plan. Except for the requirement that the plan not discriminate in favor of officers, shareholders or the highly compensated,[32] nothing in ERISA requires a particular level or type of benefit.

In the instant case, the companies and the unions agreed upon a plan benefit formula which included the integration of pension plan benefits with workmen's compensation benefits. This decision was arrived at through collective bargaining and reflects the judgment of the parties as to the types of pension payments best suited to their needs. Nothing in ERISA forecloses this type of agreement.

Integration of pension benefits with workmen's compensation benefits was and is, at all times, a function of the benefit definition process under a plan. To hold that the minimum vesting standards of ERISA, which protect an employee's right to a pension, can in-

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32. See Section 401(a)(4) of the Internal Revenue Code, 26 U.S.C. §401(a)(4).

validate a specific part of the plan's definition of benefits agreed to between the parties is to rewrite the pension plan. The argument of Appellants and Petitioners confuses the vesting of a right with the nature of the benefit to which the right attaches. Rules concerning vesting cannot be used to increase the benefits to which a plan participant is entitled.

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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Nos. 79-1943, 80-193

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH ALESSI, ET AL., APPELLANTS

v.

RAYBESTOS-MANHATTAN, INC.

HENRY BUCZYNSKI, ET AL., PETITIONERS

v.

THE GENERAL MOTORS CORPORATION

ON APPEAL FROM THE JUDGMENT OF AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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JOSEPH ALESSI, ET AL., APPELLANTS [1]

v.

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HENRY BUCZYNSKI, ET AL., PETITIONERS [2]

v.

THE GENERAL MOTORS CORPORATION

ON APPEAL FROM THE JUDGMENT OF AND ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the Treasury Regulations reasonably interpret the Employee Retirement Income Security

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[1] The additional parties in *Alessi* (No. 79-1943) are set forth at pages i-ii of the brief for the appellants in that case.

[2] The additional parties in *Buczynski* (No. 80-193) are set forth at page ii of the brief for the petitioners in that case.

Act of 1974 to provide that the reduction of an employee's pension benefit by an amount equal to a workers' compensation award is not a prohibited forfeiture under Section 203(a) of the Act.

2. Assuming that Section 203(a) of ERISA does not prohibit offsets of worker's compensation awards against pension benefits, whether the express prohibition against such offsets by Section 34:15-29 of the New Jersey Workers' Compensation Act is preempted by Section 514 of ERISA (29 U.S.C. 1144 (a)), which directs that the federal statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *."

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Internal Revenue Code of 1954 (26 U.S.C.):

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H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974) .. 6, 15
IRS Pub. No. 778 (2-72), *Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans* (1972) 21
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INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibilities with respect to the Employee Retirement Income Security Act. Pursuant to Sections 401 (a) and 501(a) of the Internal Revenue Code of 1954 (26 U.S.C.), the Secretary of the Treasury (through his delegate the Commissioner of Internal Revenue) is authorized to issue advance determinations as to whether a pension plan meets the requirements for exempt status, deferral of tax until receipt of benefits, and deductibility of contributions. Moreover, under Sections 3001-3041 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1201-1241), the Secretary of the Treasury and the Secretary of Labor have joint responsibilities for monitoring the activities of pension plans and the enforcement of the standards relating to participation, vesting, and funding.

Finally, the Secretary of the Treasury has issued a Regulation (Treasury Regulations on Income Tax, Section 1.411(a)-4(a) (26 C.F.R.)) that squarely supports the decision below. That Regulation provides that nonforfeitable rights are not considered to be forfeitable because they may be reduced to take into account benefits payable under the Social Security Act or under any other federal or state law and which are taken into account in determining plan benefits. The Regulation reflects the longstanding policy of the Commissioner of Internal Revenue to qualify pension plans which, like those involved in the instant cases, provide for offsets for workers' compensation benefits. This policy antedated the enactment of ERISA in 1974 and has remained unchanged after the passage of that federal stat-

ute. In light of the Commissioner's position, which finds expression in several published rulings both before and after the enactment of ERISA, we are advised by the Internal Revenue Service that there are thousands of pension plans that contain such offset provisions that have been approved by the Internal Revenue Service. Collective bargaining and funding of pensions has therefore proceeded upon the assumption of both management and labor that such offset provisions are permissible. Because this Treasury Regulation governs the first question presented, the government participated as amicus curiae in the court of appeals in support of the employers. Hence, the United States has a direct interest in this litigation.

STATEMENT

These cases, which were consolidated for argument in the court of appeals, arise on virtually identical facts.

General Motors Corporation and Raybestos-Manhattan, Inc. maintain pension plans for their employees that are covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (ERISA). Both pension plans provide that retirement income benefits shall be reduced to the extent a recipient is eligible to receive payments under a workers' compensation law or similar statute, when such workers' compensation payments are distributed concurrently with the retirement income (J.A. 93a-94a).[3]

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[3] Unless otherwise indicated, "J.A." references are to the joint appendix in No. 80-193 (*Buczynski*).

The General Motors offset clause provides:

Section 2. Deductions for Workers' Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law,

In 1977, New Jersey enacted a statute expressly prohibiting such offset provisions. The statute, which became effective on July 14, 1977, added the following italized sentence to Section 34:15-29 of the New Jersey Workers' Compensation Act, N.J. Stat. Ann. (West Supp. 1979). The complete section now provides:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid

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equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

The Raybestos offset clause provides:

All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may be enacted from time to time, which payments are paid concurrently with the Retirement Income.

> wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

Shortly after New Jersey enacted the addition to Section 34:15-29, petitioners in No. 80-193 (*Buczynski*) and appellants in No. 79-1943 (*Alessi*) brought suits against General Motors and Raybestos respectively in the New Jersey state courts. The named plaintiffs in each suit were former employees of those companies who had recovered workers' compensation awards against the companies and were therefore subject to commensurate reductions in their pension benefits. The suits sought permanent injunctions against the offsets and recoupment damages against offsets that had already been made (J.A. 95a-96a).

2. The companies successfully sought to remove both cases to the United States District Court for the District of New Jersey, where they were assigned to two district judges. In No. 80-193 (*Buczynski*), the district court concluded that where a pension plan makes the employee's right to accrued benefits derived from employer contributions conditional upon a factor other than years of service and age, the plan is unlawful under ERISA, unless the condition is one of those set forth in 29 U.S.C. 1053(a)(3). Under that provision, a pension plan is not deemed to violate the forfeiture restrictions if it provides for forfeitability in the event of death, employment in the same industry covered by the plan, retroactivity of certain plan amendments, or withdrawal by the employee of

amounts attributable to benefits derived from mandatory contributions made by him. Since forfeiture to the extent of receipt of worker's compensation benefits is not one of the exceptions set forth in 29 U.S.C. 1053(a)(3), the district court concluded that the plan violated ERISA (J.A. 63a).

Assuming arguendo that the offset provision in the pension plan did not violate the prohibitions against forfeiture of ERISA, the district court further ruled that such offsets were barred by the New Jersey Workers' Compensation Act and that in enacting ERISA Congress did not intend to preempt the state workers' compensation law (J.A. 67a-69a). In a subsequent opinion issued upon General Motors' motion for reconsideration, the district court addressed the applicability of Treas. Regs., Section 1.411(a)-4(a) (26 C.F.R.), for the first time. It ruled that the Regulation was inconsistent with the forfeiture restrictions of ERISA (J.A. 70a-75a).[4]

3. The court of appeals reversed (J.A. 93a-118a). It held that "[t]he legislative history affirmatively supports the Treasury Regulation, and, at the very least, any conflict between the regulation and the statute, if one indeed exists, is clearly insufficient to mandate invalidation" (J.A. 101a).

In so ruling, the court of appeals rejected the district court's premise that all benefit reductions are forfeitures and all forfeitures are impermissible except for the four exceptions set forth in 29 U.S.C. 1053(a)(3). The court recognized that Congress' approval of the Internal Revenue Service's practice of allowing offsets of Social Security benefits against

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[4] In No. 79-1943 (*Alessi*), the district court likewise ruled for the plaintiff-employees but issued an unpublished letter opinion (J.A. 96a).

pension benefits refuted the district court's reading of the statute. As the court of appeals observed, when ERISA was enacted, the statute and the legislative history show that Congress chose not to bar the Social Security offset entirely but merely to prohibit increases in the amount of the offset based upon increases in the amount of Social Security benefits. See 26 U.S.C. 401(a)(15); H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 29, 68-69 (1974). The court therefore concluded that "Congress's implicit approval of the Social Security offset compels the conclusion that such an offset is *not* a forfeiture. Thus, the very basis on which the district courts found the Treasury Regulation in issue here to conflict with § 1053(a) is in error" (emphasis in original) (J.A. 108a).

The court of appeals held that there was an insufficient basis to strike down the Treasury Regulation in the absence of clear evidence that Congress intended to prohibit offsets for workers' compensation. In support of its conclusion, the court cited a specific Internal Revenue Service ruling approving such offsets (Rev. Rul. 68-243, 1968-1 Cum. Bull. 157), which was republished on three subsequent occasions. Moreover, a review of the legislative history convinced the court that Congress was familiar with the IRS rules on integration of benefits in pension plans when it enacted ERISA and evidenced its intention to preserve them. The court of appeals therefore upheld the validity of the Regulation (J.A. 111a-112a).

Finally, the court of appeals held that ERISA preempts Section 34:15-29 of the New Jersey Workers' Compensation Act, N.J. Stat. Ann. (West Supp. 1979). In addressing the preemption provision of ERISA (29 U.S.C. 1144(a)), the court noted that the

legislative history "make[s] plain that the preemptive intent is just as broad as its language suggests" (J.A. 117a). The court concluded "that the preemption provision is intended to be read in its normal dictionary sense, and that the New Jersey statute prohibiting Workmen's Compensation offsets cannot stand (footnote omitted)" (*ibid.*).

SUMMARY OF ARGUMENT

I.

A. The court of appeals correctly held that the Treasury Regulations reasonably interpret ERISA to provide that a reduction of an employee's pension benefits by the amount of a workers' compensation award is not a prohibited forfeiture under Section 203(a) of the Act.

The Regulation in question—Section 1.411(a)-4(a)—was promulgated under Section 411 of the Internal Revenue Code which corresponds to Section 203 of ERISA. It provides that "* * * nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits * * *" Workers' compensation is clearly encompassed by the terms of the Regulation as it is a benefit "provided under any other * * * State law * * *." Hence, if the Regulation is valid, workers' compensation offsets are not barred by ERISA.

Neither Section 203(a) nor any other provision of ERISA bars such offsets. Section 203(a) announces a fundamental rule of nonforfeiture of pension ben-

efits with a number of exceptions. Petitioners'[5] case rests on the premise that workers' compensation offsets are prohibited because they are not included in the list of permissible forfeitures enumerated in Section 203(a). But petitioners' argument overlooks the other parts of the statute that permit offsets for Social Security benefits except to the extent such benefits are increased after retirement. In enacting these provisions, Congress specifically approved the Internal Revenue Service's administrative practice of approving offsets for Social Security benefits as long as such offsets were fixed at the level of the benefits paid at the commencement of retirement. Thus, the permissible offset for Social Security benefits shows that Congress did not intend to bar offsets for benefits that were traditionally integrable components of retirement plans where such offsets did not work a net reduction in the employee's contemplated retirement income. Here, of course, the offset for workers' compensation does not occasion a loss of any of petitioners' pension rights. Rather, it simply serves to fund their pensions in part from another source during the period in which the workers' compensation award was payable.

B. Given Congress' silence with respect to workers' compensation offsets, it is plain that it left the question of workers' compensation offsets open to administrative resolution. On this clean slate, it was open for the Commissioner to interpret the statute to permit the similar practice of integrating workers' compensation benefits in retirement systems. It is no answer to argue, as petitioners do, that disability benefits such as workers' compensation must be

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[5] For convenience, appellants and petitioners will be referred to collectively herein as "petitioners".

treated differently from retirement benefits. The Social Security program encompasses disability benefits as well and those benefits are fully available for integration (and hence offset) in a pension plan. Since the Regulation is neither unreasonable nor inconsistent with the statute, the decisions of this Court make clear that it should be upheld. *Fulman* v. *United States*, 434 U.S. 528, 533-536 (1978), and cases cited therein.

Moreover, the Regulation also reflects the long-standing policy of the Commissioner—announced in three published rulings prior to the enactment of ERISA—to permit pension plans to integrate workers' compensation in retirement systems without jeopardizing the qualification of the plans for federal tax purposes. It was the common understanding upon which collective bargaining and pension funding proceeded that workers' compensation was an appropriate offset in a pension plan as an integrable component. To the extent the legislative history of ERISA is instructive it suggests that Congress was aware of the Service's policy and intended that it be applied with respect to benefits covered by ERISA. The Commissioner's Regulation was therefore a valid exercise of his authority to prescribe "all needful rules and regulations" (26 U.S.C. 7805(a)).

II.

The court of appeals also correctly held that the provision of the New Jersey Workers' Compensation Act, which concededly prohibits the offsets in question here, was preempted by Section 514(a) of ERISA (29 U.S.C. 1144(a)). Section 514(a) explicitly provides that ERISA supersedes all state laws which "relate to" pension plans covered by the Act. There can be no serious doubt that the New Jersey statute

relates to pension plans to the extent that it prescribes the manner in which the pension rights of employees may be fixed and computed. The legislative history of the preemption provision shows that Congress intended ERISA preemption to apply in its broadest sense to bar application of any state law which could affect the administration of plans covered by the federal statute. Hence, the New Jersey statute prohibiting workers' compensation offsets against pension benefits cannot stand.

ARGUMENT

I.

THE TREASURY REGULATIONS REASONABLY INTERPRET ERISA TO PROVIDE THAT A REDUCTION OF AN EMPLOYEE'S PENSION BENEFITS BY THE AMOUNT OF A WORKERS' COMPENSATION AWARD IS NOT A PROHIBITED FORFEITURE UNDER SECTION 203(a) OF THE ACT

The principal question presented in these cases is whether provisions in a pension plan requiring offsets against retirement benefits equal to workers' compensation awards payable under state law violate the restrictions against forfeiture under the Employee Retirement Income Security Act (ERISA). It is an issue on which the courts of appeals are divided. On the authority of a governing Treasury Regulation (Section 1.411(a)-4(a) (26 C.F.R.)), the decision below held that workers' compensation offset provisions do not violate the restrictions against forfeiture in Section 203(a) of ERISA, 29 U.S.C. 1053. Since the grant of certiorari and the noting of probable jurisdiction in the instant cases, however, a divided panel of the Sixth Circuit has ruled to the contrary

and concluded that such offsets are prohibited by ERISA. *Utility Workers Union* v. *Consumers Power Co.*, No. 78-1402 (Jan. 6, 1981). Moreover, the court below also ruled that the New Jersey statutory prohibition against such offsets was preempted by Section 514(a) of ERISA, 29 U.S.C. 1144, which directs that "the provisions of this subchapter * * * shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in * * * [this title]."

We submit that the decision below correctly held that offsets for workers' compensation awards are not prohibited forfeitures under ERISA and that ERISA preempts the New Jersey statutory rule to the contrary. As we shall point out in greater detail (*infra*, pages 16-18), the statute does not explicitly address the first question presented. But in the absence of any direct statutory guidance, we believe that the explicit Treasury Regulation approving such offsets is entitled to deference as a reasonable interpretation of the statute. The Regulation in question (Section 1.411(a)-4(a)) explicitly directs that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits."

Since workers' compensation benefits are clearly "benefits which are provided under * * * State law," the offsets at issue are proper if the Regulation is a valid interpretation of the statute. Such Regulations, as this Court has frequently observed, must be upheld unless unreasonable or in conflict with the statute. In our view, the Regulation meets this standard. Although the Regulation was issued in 1977,

it reflects the longstanding policy of the Treasury to permit integration of state benefits into pension plans and to qualify for federal tax purposes pension plans that provide for such integration. As a result of this policy enunciated in several published rulings, collective bargaining and funding proceeded on the assumption that integration of workmen's compensation into pension plans was permissible for federal tax qualification. And by promulgating an explicit Regulation approving the practice subsequent to the enactment of ERISA, the Treasury assured pension plan managers that such integration was not a prohibited forfeiture. In our view, this Regulation, upon which there has been substantial reliance, should govern the disposition of the question as the authoritative interpretation of the statute. We turn now to a detailed examination of the pertinent provisions of ERISA.

A. Section 203(a)(3) Of ERISA Does Not Bar Offsets For Workers' Compensation

1. As this Court observed in *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-362 (1980), the predicate for the enactment of ERISA was Congress' findings "that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits * * *" (29 U.S.C. 1001(a)). Hence, Title I of ERISA, which contains the provisions pertinent to these cases (29 U.S.C. 1001-1144), requires minimum participation, vesting and funding schedules, establishes standards of fiduciary conduct for plan administrators, and provides for civil and criminal enforcement of the Act.

The statute announces a fundamental principle of nonforfeiture of pension benefits. That general rule is set forth in Section 203(a) of ERISA, 29 U.S.C. 1053(a), which states that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age * * *." There are, however, a number of exceptions to the rule against forfeitability. These exceptions, set forth in Section 203(a)(3), are nonpayment of benefits if the employee dies (Section 203(a)(3)(A)); suspension of benefits if the employee takes a job with an employer in the same industry (Section 203(a)(3)(B)); retroactivity of certain plan amendments (Section 203(a)(3)(C)); and withdrawals by certain employees of any amount attributable to the benefit derived from mandatory contributions made by such employees (Section 203(a)(3)(D)). Reinforcing this statutory structure, Section 3(19) of the Act (29 U.S.C. 1002(19)) provides that "a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) (Section 203(a)(3) [of ERISA]) of this title."

In urging that offsets for workers' compensation awards are prohibited forfeitures, petitioners pursue the following syllogism: all reductions in benefits are forfeitures; all forfeitures are prohibited by Section 1053(a), with the sole exceptions enumerated in Section 1053(a)(3). Since workers' compensation offsets are not included in the list of permissible forfeitures in Section 1053(a)(3), petitioners therefore conclude that such offsets are prohibited because they expand the class of permissible offsets beyond those specifically enumerated in Section 1053(a)(3).

But petitioners' syllogism ignores other parts of the statute that refute their basic assumption that the sole permissible reductions are set forth in Section 1053(a). Prior to the enactment of ERISA, Section 401(a)(5) of the Internal Revenue Code of 1954 had long provided that a pension plan would not be considered discriminatory (and thereby qualify for tax-exempt status) "merely because the contributions or benefits of or on behalf of the employees under the plan * * * differ because of retirement benefits created under State or Federal law * * *." Pursuant to this statute, the Internal Revenue Service had permitted qualified pension plans to offset pension benefits by the amount of Social Security benefits that a plan participant received. See Treas. Regs., Section 1.401-4(b) (26 C.F.R.). However, while allowing such offsets, the Internal Revenue Service would not permit an employer to increase the offset on account of an increase in the level of Social Security benefits occurring after an employee retired and began to receive his pension.

In enacting ERISA, Congress was aware of the Service's administrative practice and specifically approved such offsets for Social Security benefits as long as such offsets were fixed at the level of the Social Security benefits paid at the commencement of retirement. Thus, Section 401(a)(15) of the Internal Revenue Code of 1954, enacted as Section 102(e) of Title II of ERISA, provides that "a [pension] trust shall not constitute a qualified trust * * * unless under the plan of which such trust is a part * * * such benefits are not decreased by reason of any increase in the benefit levels payable under title II of the Social Security Act * * *." Section 206, which is the comparable provision in title I of ERISA (29 U.S.C. 1056(b)) repeats the rule with respect to

increases in Social Security benefits and extends it to increases in benefits provided under the Railroad Retirement Act. See H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 29 (1974).[6]

2. The undisputed fact that offsets for Social Security benefits are permissible under ERISA refutes one of the essential links in petitioners' chain of reasoning, *i.e.*, that the offsets are prohibited forfeitures unles they are enumerated in Section 203(a)(3). As the court of appeals correctly observed (J.A. 109a-110a), Congress' ratification of the Internal Revenue Service's longstanding practice of permitting the integration of Social Security benefits (but not post-retirement increases in Social Security) into a pension plan shows that it did not intend to bar offsets for similar benefits that would not work a net reduction in an employee's contemplated retirement income. Here, of course, the offset for workers' compensation does not occasion a net reduction in petitioners' pension rights; rather, it simply serves to fund their pensions in part from another source during the period in which their workers' compensation is paid. Thus, the offset in question does not work

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[6] In approving the integration of Social Security benefits in private pension plans subject to ERISA, Congress expressed concern that the imposition of unnecessary cost burdens upon such plans would discourage their creation. Thus, the House Ways and Means Committee reported that (H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 29 (1974):

> [Y]our committee is very much aware that many present plans are fully or partially integrated [with the Social Security program] and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth [of] or perhaps even eliminated private retirement plans.

a "forfeiture" in the sense that such a term connotes a reduction in overall benefits received.

B. The Court Of Appeals Correctly Upheld The Treasury Regulation Permitting Offsets Of Workers' Compensation Awards As A Reasonable Interpretation Of The Statute That Reflects The Longstanding Practice Of Integrating Such Benefits In Retirement Systems

1. Given Congress' approval of the offset for Social Security as a traditional integrable component in retirement systems[7] and its silence with respect to workers' compensation, the Treasury Regulation permitting offsets for workers' compensation should be upheld as a reasonable interpretation of the statute that reflects a similar practice of integrating such benefits in retirement systems.

It is no answer for petitioners to contend (Alessi Br. 28-38, Buczynski Br. 34-35) that workers' compensation is not comparable to Social Security because the former is designed to compensate for employment-related injuries while Social Security is a pension designed to compensate for wages lost as a result of old age. As the court of appeals correctly pointed out, the argument "fails to recognize the breadth of the Social Security program. Social Security provides benefits for *disabilities*, see 42 U.S.C. § 423 (1976), as well as benefits for old age. Thus, the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits

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[7] The permitted offset for Social Security refutes petitioners' contention (Buczynski Br. 8, 32-34; Alessi Br. 16-18) that their vested pension rights are a form of deferred compensation and that any offset denies them part of their earned wages. Under this theory, any offset (including the permitted offset for Social Security) would be improper.

for *disability* benefits. The Social Security offset, since it includes an offset of disability benefits, makes any purported distinction between the Social Security offset and the Workmen's Compensation offset meaningless" (emphasis in original) (J.A. 108a).[8] There is accordingly no principle that prohibits pension offsets for payments made for disability under federal or state law. Indeed, one could argue that workers' compensation—which limits awards to work-related injuries—is a more appropriate subject for offset against a pension for service in the workplace than Social Security disability, which covers disabilities from non-work-related injuries as well.[9]

At all events, the process of proceeding by inference or analogy from the Social Security offset to workers' compensation yields diminishing returns. The inferences and analogies serve at best to refute petitioners' argument that the offset for workers' compensation is contrary to the language of ERISA or incompatible with its underlying policies. But analogies by their very nature cannot affirmatively demonstrate the existence of the offset for workers'

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[8] The same point may be made with respect to Railroad Retirement Act benefits. As in the case of Social Security, Congress permitted offsets of Railroad Retirement Act benefits (see 29 U.S.C. 1056(b)), which include payments for disabilities as well as for old age. See 45 U.S.C. 231a(a)(1)(iv) and (v).

[9] Contrary to petitioners' argument (Alessi Br. 39), the fact that under 42 U.S.C. 424a, workers' compensation is offset against Social Security disability, but not against retirement benefits, does not support their challenge to the offsets at issue here. The existence of such a rule under the Social Security system has no bearing upon private pension systems covered by ERISA where Congress permitted plans the option whether or not to provide for offsets for workers' compensation.

compensation in the statute. Given the silence of the statute on this score, it is plain that Congress left the question as to the propriety of such offsets to administrative resolution. On this clean slate, we submit that the Treasury Regulation permitting offsets for "benefits which are provided under the Social Security Act or under any other Federal or State law" (26 C.F.R. 1.411(a)-4(a)) should be upheld as a reasonable interpretation of the statute.[10]

The Regulation in question—Section 1.411(a)-4(a)—was promulgated in 1977 under Section 411 of the Internal Revenue Code, which corresponds to Section 203 of ERISA, 29 U.S.C. 1053(a). The Regulation provides that "* * * nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits." Workers' compensation is clearly encompassed by the

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[10] Contrary to petitioners' argument (Alessi Br. 30-31, Buczynski Br. 27-28), the fact that Section 401(a)(5) speaks of "retirement benefits created under the Federal or State law" does not perforce cast doubt upon Section 1.411(a)-4(a) which encompasses "benefits which are [payable] provided under Federal or State law." It is Section 411 (corresponding to Section 203 of ERISA) which is the statute under which the Regulation was promulgated and, as we have shown, nothing in ERISA prohibits the offset of non-retirement-type benefits such as Social Security and Railroad Retirement Act disability payments. In the absence of a statutory prohibition, the Commissioner was therefore able to provide that workers' compensation is a permissible offset. At all events, Congress' explicit approval of the application of the antidiscrimination rules to benefit accruals under ERISA necessarily includes approval of the Commissioner's thrice-published position permitting the integration of workers' compensation in a qualified pension plan (see pages 20-22, *infra*).

terms of the Regulation as a benefit "provided under any other * * * State law and which [is] taken into account in determining plan benefits." [11] We have shown (*supra*, pages 13-16), that Section 203 does not bar such an offset. There is no requirement, as petitioners would have it (Buczynski Br. 24), that would make the validity of the Regulation depend upon specific statutory authorization. It is sufficient that the Regulation is not inconsistent with the statute. "This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous construction by those charged with administration of these statutes which should not be overruled except for weighty reasons." *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501 (1948). Accord: *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967); *Bingler* v. *Johnson*, 394 U.S. 741, 747-751 (1969); *Fulman* v. *United States*, 434 U.S. 528, 533-536 (1978).[12]

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[11] The core of the Sixth Circuit's contrary holding in *Utility Workers Union* v. *Consumers Power Co.*, *supra*, was its conclusion that the Regulation did not encompass workers' compensation offsets. But there can be no doubt that workers' compensation is a benefit provided under state law. Contrary to the court's apparent belief, the fact that the Regulation did not specifically refer to worker's compensation does not foreclose its application to such benefits by the published rulings, which both antedated and postdated the Regulation.

[12] Although the court of appeals characterized the Regulation as legislative (J.A. 99a-101a), it is in our view interpretative for it explains and construes statutory language (26 U.S.C. 401(a), 411) rather than promulgates rules pursuant to a general congressional authorization containing no guidelines. See, as specimens of the latter type, Sections 385(a) and 1502 of the Internal Revenue Code respectively au-

Given the silence of the statute, the Commissioner might well have reached the opposite conclusion. But that fact, even if coupled with judicial preference for another rule, cannot serve to set aside a Regulation issued by the Commissioner pursuant to his authority to prescribe "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. 7805(a). As this Court pointed out in *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 488 (1979), "The choice among reasonable interpretations is for the Commissioner, not the courts."

2. a. In light of the foregoing, we submit that the judgment of the court of appeals can be affirmed on the ground that the governing Treasury Regulation is a valid exercise of the Commissioner's authority and that it is not unreasonable or inconsistent with the statute. But the Regulation also reflects the longstanding policy of the Commissioner to permit pension plans to integrate workers' compensation in retirement systems without jeopardizing the qualification of the plans for federal tax purposes. This policy antedated the enactment of ERISA. Moreover, the promulgation of the Regulation in 1977 under Section 411 of the Internal Revenue Code (corresponding to Section 203 of ERISA) shows that the propriety of the practice survived the applicability of the ERISA rules.

In the course of administering Section 401(a)(4) and (5) of the Internal Revenue Code dealing with

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thorizing the promulgation of Regulations to determine whether an interest in a corporation is stock or debt, and for the filing of consolidated returns of corporations. But even as an interpretative Regulation, Section 1.411(a)-4(a) meets the standard for validity established by the decisions of this Court cited above.

the requirement that a qualified pension plan not discriminate in favor of highly-paid employees, the Internal Revenue Service ruled that "benefits payable under a workmen's compensation law or occupational diseases law * * * are acceptable as an offset against benefits payable under [a] qualified pension plan * * *." Rev. Rul. 68-243, 1968-1 Cum. Bull. 157, 158. The substance of this ruling was republished in Rev. Rul. 69-421, part 4(j)(4), 1969-2 Cum. Bull. 61, 72, in IRS Pub. No. 778 (2-72), *Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans* 15 (1972), and in Rev. Rul. 78-178, 1978-1 Cum. Bull. 117. Prior to the commencement of the litigation in these cases, it was the common understanding of both pension managers and representatives of organized labor that workers' compensation was an appropriate offset in a pension plan and that integration of such benefits would not violate the antidiscrimination rules of Section 401(a)(5).

As the court of appeals pointed out (J.A. 112a), to the extent the legislative history of ERISA is instructive, it suggests that Congress was aware of the Service's policy and approved it. Thus, the Conference Committee stated that it "intend[ed] that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 277 (1974). Given Congress' explicit approval of the Service's rules with respect to antidiscrimination and its intent to apply them to benefit accruals under ERISA, the Commissioner's

Regulation extending his workers' compensation offset policy to the ERISA context was a valid exercise of his rulemaking authority.[13]

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[13] Contrary to petitioners' argument (Buczynski, Br. 30-33), the fact that the Commissioner does not permit benefits under a plan to be offset by disability damages recovered by an employee in a common law action against the employer does not cast doubt upon the validity of his policy permitting offsets for workers' compensation. See Rev. Rul. 68-243, *supra*. While workers' compensation may be viewed as a comprehensive replacement for the traditional tort remedies and their attendant common law defenses, the theories underlying the two legal systems are markedly different. For example, tort liability rests upon a finding of fault by the employer while under worker's compensation, the fault of both the employer and employee are irrelevant. All that is required is that the injury be work related. 1A *Larson, Workmen's Compensation Law* §§ 20.00, 30.10 (1979 ed.). Unlike tort liability, worker's compensation is an overall system of wage-loss protection the primary ingredient of which is not medical impairment but loss of earning capacity. See also, 2 & 4 *Larson, supra*, §§ 57.10, 97.10.

In light of these differences, the Commissioner could reasonably distinguish between a tort judgment and a workers' compensation award. Indeed, if a tort judgment (with its presumption of fault) could be offset against a pension benefit, the employer could use pension assets to satisfy a liability borne out of his own misconduct. Workers' compensation, however, suffers from no such impediment. Moreover, the wage-loss protection theory of workers' compensation makes it a traditional integrable component in a retirement system. Finally, to the extent that a workers' compensation award reimburses the worker for medical expenses or provides fixed payments for bodily impairment, the Commissioner does not permit such awards to be used to offset pension benefits because such awards may not be provided under a qualified pension plan. Rev. Rul. 78-178, *supra*, 1978-1 Cum. Bull. at 118. Indeed, the General Motors offset clause likewise provides that no deduction shall be made for such medical payments (see page 3, note 3, *supra*). Thus, contrary to the

II.

SECTION 514(a) OF ERISA PREEMPTS NEW JERSEY LAW INSOFAR AS ITS APPLICATION WOULD PROHIBIT OFFSETS OF WORKERS' COMPENSATION AWARDS AGAINST PENSION BENEFITS

If the Court agrees with our submission in point I, *supra*, that Section 1.414(a)-4(a) of the Treasury Regulations properly construes ERISA as not barring offsets for workers' compensation, it is necessary to address petitioners' alternative contention that such offsets are prohibited by New Jersey law. The particular provision upon which they rely is Section 34:15-29 of the New Jersey Workers' Compensation Act, N.J. Stat. Ann. (West. Supp. 1979) which states:

> The right of compensation granted by this chapter [the workmen's compensation act] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

The New Jersey statute, if applicable, would prohibit the offset clauses at issue in these cases. But we submit that the court of appeals correctly held that Section 514(a) of ERISA preempts the state statute and bars its application. Section 514(a) of ERISA, 29 U.S.C. 1144(a), provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now

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Sixth Circuit's view in *Utility Workers Union* v. *Consumers Power Co.*, *supra* (slip op. 19), in no sense does the Commissioner's offset policy put an injured employee in a worse position than a healthy employee with comparable years of service under the pension plan.

> or hereafter relate to any employee benefit plan described in * * * [this title].

The court of appeals (J.A. 113a-117a) correctly held that Section 514 preempted the New Jersey statute. Sensitive to the voluntary aspects of the private benefit plan system, Congress determined to lessen the disruptive effect of the new federal law by saving plans from possibly inconsistent or duplicative state laws. The legislative history of Section 514 describes this purpose with clarity. Indeed, the present version of Section 514 shows that Congress consciously rejected proposals for preemption provisions of narrower scope. While the earlier proposals had limited federal preemption to subjects covered by the Act, the Conference Committee enlarged the provision to preempt all state laws that "relate to" plans subject to ERISA. As Senator Javits, a sponsor of ERISA, explained:

> Both the House and Senate bills provided for the preemption of State law, but * * * defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation * * *. [O]n balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefits programs.[14]

The managers of the bill reaffirmed the intent of Congress in unmistakably explicit terms. For ex-

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[14] 120 Cong. Rec. 29942 (1974).

ample, Representative Dent, Chairman of the Subcommittee on Labor of the House Education and Labor Committee, declared:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. * * *. The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof * * * which would affect any employee benefit plan [subject to ERISA].[15]

And Senator Williams added:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State or local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which may have the force or effect of law.[16]

In view of this unequivocal expression of legislative intent, it is not surprising that the federal courts

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[15] 120 Cong. Rec. 29197 (1974).

[16] 120 Cong. Rec. 29933 (1974).

that have considered the scope of Section 514 have held, almost uniformly and in a variety of contexts in which these questions have been presented, that ERISA preemption should—in the words of Senator Williams—"apply in its broadest sense" to all state laws. For example, in *Azzaro* v. *Harnett*, 414 F. Supp. 473, 474 (S.D.N.Y. 1976), aff'd, 553 F.2d 93 (2d Cir.), cert. denied, 434 U.S. 824 (1977), the court held that a state was without jurisdiction even to inquire as to the status of a plan participant. As the court reasoned (414 F. Supp. at 474): "The legislative history of ERISA shows that Congress intended absolute preemption of the field of employee benefit plans." Accord: *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd per curiam, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978) (states may not regulate employee benefit plans as "health care service plans" providing prepared medical services); *National Carriers' Conf. Committee* v. *Heffernan*, 454 F. Supp. 914, 915-917 (D. Conn. 1978) (states may not tax an employee benefit plan covered by ERISA). See also *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980-981 (1978), (employee welfare plan may not be treated as an "insurance company" under state insurance laws).

There is accordingly no basis for petitioners' argument (Buczynski Br. 46) that ERISA preempts only statutes concerning pension plans and that the New Jersey statute addresses workers' compensation. The New Jersey statute seeks to accomplish two objectives. First, it accords injured employees a right to compensation. Second, it directs that pension benefits available to the employee "shall not be set off against employees' retirement pension benefits or payments." Surely this latter aspect of the New

Jersey statute "relate[s] to any employee benefit plan" within the plain meaning of Section 514(a) of ERISA. By its statute, New Jersey seeks to control the administration of pension plans under the jurisdiction of ERISA. But in enacting Section 514(a), Congress sought to eliminate the application of such conflicting state law and "occupy the entire field of employee benefit regulation." *Hewlett-Packard Co.* v. *Barnes*, *supra*, 425 F. Supp. at 1299. Hence, the New Jersey statute prohibiting workers' compensation offsets against pension benefits cannot stand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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